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In The

Supreme Court of the United States

October Term, 1995

DALE NELSON,

Petitioner,

vs.

J.C. PENNEY COMPANY, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does *St. Mary's Honor Center v. Hicks*, __ U.S. __, 113 S. Ct. 2742 (1993) permit a jury in an ADEA case to infer and find intentional discrimination based upon plaintiff's prima facie case and a determination that defendant's reason for discharge was pretextual?

2. Can the Court of Appeals require a plaintiff to produce direct proof of discrimination in an ADEA claim, contrary to the standards articulated in *St. Mary's Honor Center v. Hicks, supra*?

3. Is there a split in the Court of Appeals concerning the burden of proof required in an employment discrimination jury trial following the *Hicks* decision?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Dale Nelson, and the Respondent, J.C. Penney Company. Respondent has no parent company or nonwholly-owned subsidiaries.

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The Petitioner, Dale Nelson, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit which was entered in the proceeding on January 24, 1996.

OPINIONS BELOW

The latest opinion of the United States Court of Appeals for the Eighth Circuit in this case was a decision to deny a Petition for Rehearing en banc. That opinion was issued on March 4, 1996, in *Nelson v. J.C. Penney Company, Inc.*, which is reproduced in the Appendices to this Petition as Exhibit A.

The modified decision that was issued by the three-judge panel that heard this case is reproduced in the Appendices to this Petition as Exhibit B. The Memorandum Opinion and Judgment entered in this case by the United States District Court of the Northern District of Iowa is reproduced in the Appendices to this Petition as Exhibit C.

STATEMENT OF JURISDICTION

Respondent J.C. Penney Company, Inc. sought review of the decision and order entered by the District Court, which upheld the jury verdict and issued damages of $932,280 against it. The court below reversed and dismissed this decision on January 24, 1996. It denied Nelson's Petition for Rehearing En Banc on March 4, 1996.

This Court has jurisdiction to review the Judgment of the Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statute involved is the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, which is set forth in the Appendices as Exhibit D.

STATEMENT OF THE CASE

This case was initially filed in 1992 in the United States District Court for the Northern District of Iowa. Nelson was terminated approximately 6 months after undergoing extensive surgery and treatment for cancer. The J.C. Penney Company was well aware of his age and disability at the time of his termination. Nelson alleged unlawful age discrimination, retaliation, disability discrimination, and unlawful retaliation under ERISA. An eight-day jury trial was held in Sioux City, Iowa, July 13-22, 1993.

The jury found that Nelson was the victim of unlawful age discrimination and retaliation, and that Penney's conduct was willful. The court dismissed Nelson's disability and ERISA claims in a subsequent post-trial opinion.

The court determined the damages in this case. Following various post-trial motions, and further findings of fact, the court entered an Order and Judgment in Nelson's favor of $932,280, plus interest. It denied Penney's motions for a new trial on December 23, 1994.

The Penney Company appealed the case to the United States Court of Appeals for the Eighth Circuit. In *Nelson v. J.C. Penney Company, Inc.*, __F.3d __ (8th Cir. 1996) (Exhibit B), that court issued a decision that reversed and dismissed the Judgment and Order entered by the District Court.

Following the filing of a petition for Rehearing En Banc, the three-judge panel of the Court of Appeals that initially heard the case issued a slightly modified opinion on January 24, 1996. A majority of the full court, with Chief Judge Arnold and Judge Beam dissenting, issued an Order denying the Petition for Rehearing En Banc on March 4, 1996.

The operative facts of this case are set out, for the most part in the District Court Opinion which is attached as Exhibit C.

REASONS FOR GRANTING THE WRIT

A Writ of Certiorari must issue in this case for two basic reasons. First of all, the United States Court of Appeals for the Eighth Circuit has refused to follow the test set forth by this Court in *St. Mary's Honor Center v. Hicks*, __ U.S. __ 113 S. Ct. 2742 (1993). The decision of the three-judge panel, even when modified, *did not refer to or even cite* the *Hicks* case and its holding regarding a plaintiff's proof of discrimination. The rationale announced by the Eighth Circuit runs directly against the standard articulated by this Court in *Hicks*, where it stated as follows:

> The fact finders disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendants proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, [FN4] and the Court of Appeals is correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is required," 970 F.2d. at 493 (emphasis added).

113 S. Ct. at 2749.

Though *Hicks* was not an age discrimination case, this Court has acknowledged in *O'Connor v. Consolidated Coin Operators*, __ U.S. __, 64 U.S.L.W. 4243, 4244 (1996) that it

would apply to ADEA claims as well. Nelson submits that the Eighth Circuit clearly erred in holding that he was required to produce additional, direct evidence of discrimination, when the jury determined that Penney's articulated reasons were pretextual, and found that age discrimination occurred. Contained within this refusal to follow *Hicks* is the issue of whether a jury in an ADEA case must have direct proof of age discrimination in order to find for the plaintiff.

Secondly, the decision by the Court of Appeals appears to be in direct conflict with the decision in *Rhodes v. Guiberson Oil Tools*, 39 F.3d 537, *reh. en banc*, __ F.3d __ ,1996 U.S. APP. LEXIS 9877 (5th Cir. 1996), and *Barbour v. Merrill*, 48 F.3d 1270 (D.C. Cir. 1995), *cert. granted*, 116 S. Ct. 805 (1996). In the *Rhodes* case, the Court of Appeals for the Fifth Circuit, in a rehearing en banc, reversed the decision of a three-judge panel that had vacated a jury award in Mr. Rhodes favor. That court correctly followed the standards articulated in *Hicks*, and determined if there was any evidence in the record to support the discrimination claim, and the jury found the announced reasons to be pretextual, the court had a duty to affirm the jury verdict.

I.

THE COURT OF APPEALS FAILED TO FOLLOW THE STANDARD SET BY THIS COURT IN THE *HICKS* DECISION, SINCE IT REQUIRED NELSON TO PRODUCE DIRECT EVIDENCE OF AGE DISCRIMINATION.

Nelson is cognizant of the fact that this Court accepts a very limited number of cases for review. However, Nelson feels that a plaintiff's right to have the jury act as the factfinder will be abolished unless the decision of the Court of Appeals is reversed.

Nelson fully presented his age discrimination claim during

an eight-day trial. The jury listened to all the testimony on his behalf, as well as the testimony presented by The Penney Company in its defense. The jury obviously had much more familiarity with the facts and the witnesses than did the three-judge panel of the Court of Appeals. Yet the Court of Appeals chose to ignore the deliberations and observations made by the jury, and dismissed a verdic. in Nelson's favor that was clearly supported by evidence of discrimination as well as pretext on the part of The Penney Company.

This Court acknowledged in *Hicks* the great deference that should be given to the factfinder in a discrimination trial:

> That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. That remains a question for the factfinder to answer, subject, of course, to appellate review — which should be conducted on remand in this case under the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a), see, e.g., Anderson v. Bessemer City, 470 U.S. 564, 573-576 (1985).

113 S. Ct. at 2756.

In accord with its prior decision in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-253 & n. 6, 101 S. Ct. 1089, 1093-94, & n. 6 (1981), wherein this Court stated that the plaintiff may meet its burden of persuasion by proving the defendants proffered reasons were pretextual, the *Hicks* decision repeatedly stressed that it was up to the factfinder to determine whether the defendant had committed unlawful

discrimination. That finding, the Court noted, could be based on the falsity of the proffered defense, or something more. However, nowhere did the Court state that a plaintiff had to have some "direct evidence" of unlawful discrimination in order to prevail as a matter of law.

Rather, the Court concluded as follows:

> We reaffirm today what we said in Aikens:
>
> > [T]he question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be "eyewitness" testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern "the basic allocation of burdens and order of presentation of proof," Burdine, 450 U.S. at 252, in deciding this ultimate question. Aikens, 460 U.S. at 716.

113 S. Ct. at 2756.

As a matter of illustration, Nelson sets out, in a side-by-side comparison, the Eighth Circuit standard and the *Hicks* standard:

LANGUAGE FROM *NELSON v. J.C. PENNEY CO.*	LANGUAGE FROM *HICKS*
A fact finder may not simply convert a condition that is necessary for a finding of liability (here, knowledge of a plaintiff's age) into one that is sufficient for such finding.	Thus, rejection of the defendants proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, [FN4] and the Court of Appeals is correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is required," 970 F.2d at 493.
. . . .	
In view of all of these circumstances, and considering the insubstantial character of the evidence presented with respect to age discrimination, we cannot agree with the trial court that Mr. Nelson established a submissible case that age "*actually motivated*" Penney's decision to fire him. *Nelson*, 26 F.3d at 800, quoting *Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701, 1706 (1993) (emphasis supplied in *Nelson*). *We see no evidence "directly reflecting the alleged discriminatory attitude."* *Nelson*, 26 F.3d at 800, quoting *Ostrowski*, 968 F.2d at 182.	113 S. Ct. at 2749.

(Ex. B at 5-6) (emphasis added).

These two decisions cannot be squared. If the Eighth Circuit is bound by the *Hicks* decision, it cannot vacate the jury verdict under these facts.

A literal reading of *Hicks* implies that all evidence, whether direct or circumstantial, has weight; neither is inherently better than the other. This Court suggested that the trier of fact can and should use its collective common sense, and that the collective common sense may sometimes be sufficient to carry the day with the jury.

The Court of Appeals agreed that Nelson established a prima facia case, but then stated that there must be evidence sufficient to permit the jury to find that a discriminatory attitude was more likely than not the motivating factor. (Ex. B, p. 4). It ignores the fact that the jury did just that when it ruled in Nelson's favor and *found the violation to be willful.*

Nelson contends the following record evidence did support the jury's determination that his age was a sustaining factor:

1. Henderson told Nelson that he knew Nelson's birthday while meeting with him in the regional office. (J.A. 817, 834-836) (Ex. B., p. 4).

2. Penney's expert witness testified that store managers are expected to retire at age 60 because their retirement benefits are maximized. (J.A. 834-836).

3. Nelson was 55 at the time of his discharge, and was replaced by a 42 year-old man.

4. Henderson, one of his managers, wrote Nelson's age at the top of his notes that he reviewed with another regional manager, Ted Stewart, when Nelson was being transferred. (Pl. Ex. 30).

The panel bypassed key points of evidence that allowed the jury, and Judge O'Brien, to conclude that age was the motivating factor. (Ex. B, p. 4-6) (J.A. 834-836). Whether it was any one of these factors that swayed the jury, or all collectively, the point is there was "sufficient evidence for a reasonable jury to reject defendant's proffered reasons", as cited above.

The panel further attempted to justify its rationale by stating that Nelson's difficulties in dealing with employees were both serious and longstanding. (Ex. B., p. 5). A simple review of his continual favorable employment evaluations, which do not indicate any such pattern of conduct (Pl. Ex. 24, 25), indicate that this decision is a reach by the panel to rewrite a jury determination that someone did not like.

Judge McMillian wrote a concurring opinion in the decision to deny the rehearing en banc, stating that the Court erroneously applied the mixed motive test from *Boatman's Bancshares*, which does require some additional proof of discrimination.

> I write specially to note that the panel opinion is misleading in adopting the dicta set forth in *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796 (8th Cir. 1994) (*Boatmen's Bancshares*), which relies upon *Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444 (8th Cir. 1993), and *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 182 (2nd Cir. 1992). The latter are mixed-motive cases in which direct evidence is required. Furthermore, *Boatmen's Bancshares* is a reduction-in-force case in which this court has traditionally required additional proof of age-animus beyond pretext. *See Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161, 1165-66

> (8th Cir. 1987); *cf. Hillebrand v. M-Tron Indus., Inc.*, 827 F.2d 363, 366-68 (8th Cir. 1987), *cert. denied*, 488 U.S. 1004 (1989). Neither of these tests applies to the *Burdine* analysis dealing with proof of pretextual reasons. As such, the panel opinion, in what is purportedly a pretext case, will cause continued confusion to the district courts and attorneys of this circuit.

(Ex. A. p. 2-3).

This concurring opinion, in a footnote, tacitly acknowledged that the Eighth Circuit, unlike others, is not following the standard set forth in *Hicks*.

> As the Seventh Circuit has pointed out in *Collier v. Budd Co.*, 66 F.3d 886, 893 n 11 (7th Cir. 1995), use of the *Boatmen's Bancshares* test in a pretext situation is inconsistent with recent decisions from most of the other circuits.
>
> > This court has held that the Supreme Court in *Saint Mary's [Honor Ctr. v. Hicks]* adopted a version of the "pretext-only" rule that allows (but does not require) a jury to find intentional discrimination if the employer has offered false or pretextual reasons for the discharge. *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1123-24 (7th Cir. 1994); *see also Lloyd v. Phillips Brothers, Inc.*, 25 F.3d 518, 522 (7th Cir 1994).

Under the pretext-only rule, rejection of the employer's proffered reasons is sufficient to permit a finding of discrimination; "no additional proof of discrimination is required." *Anderson*, 13 F.3d at 1124, *quoting Saint Mary's [Honor Ctr. V. Hicks]*, __ U.S. at __, 113 S.Ct. At 2749; *see also Lloyd*, 25 F.3d at 522 ("The trier of fact may infer intentional discrimination from its disbelief of the reasons put forward by the defendant and the elements of the prima facie case alone but is not required to do so.") The majority of other circuits to address this question have endorsed this version of the pretext-only rule. *See Waldron v. SL Industries, Inc.*, 56 F.3d 491, 495 (3rd Cir. 1995); *Walker v. NationsBank of Florida N.A.*, 53 F.3d 1548), 1557 (11th Cir. 1995); *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995), *cert. [granted in part*, 116 S.Ct. 805 (1996)]; *E.E.O.C. v. Ethan Allen, Inc.*, 44 F.3d 116, 120 (2nd Cir. 1994); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993); *but see, Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 801 (8th Cir. 1994) (employee must present additional "evidence capable of proving that the real reason for his termination was discrimination based on age" in order to recover); *Rhodes v. Guiberson Oil Tools*, 39 F.3d 537, 543-45 (5th Cir.

> 1994) (simply disproving proffered reasons is not sufficient to allow finding of age discrimination, [*reh'd en banc*, 1996 WL 37846 (Jan. 31, 1996)].

(Ex. A. at 2-3).

In *Barbour v. Merrill*, 48 F.3d 1270 (D.C. Cir. 1995), *cert. granted*, 116 S. Ct. 805 (1996), the court determined that proof of the pretext of the employer's reasons, standing alone, was enough to uphold a jury verdict on a race discrimination claim. It stated:

> As *Hicks* explained, a factfinder's rejection of the employer's nondiscriminatory reasons, while not sufficient to *compel* a finding of discrimination, nonetheless suffices to *permit* such a finding. *Id.* at __, 113 S. Ct. At 2749. According to *Hicks*, a plaintiff need only establish a prima facie case and introduce evidence sufficient to discredit the defendant's proffered nondiscriminatory reasons; at that point, the factfinder, if so persuaded, may infer discrimination. *Id.*

48 F.3d at 1277.

This was the proper interpretation of the *Hicks* standard. A court cannot unilaterally impose the additional requirement of *direct proof* that age was a factor, where *Hicks* clearly removed any such doubt.

The panel erroneously relied on *Nelson v. Boatman's*

Bancshares, Inc., 26 F.3d 796 (8th Cir. 1994), a reduction in force case. Even so, Dale Nelson can only wish that he received the standard of review that was awarded to Clarence Nelson in the *Boatmen's* case.

The evidence of age discrimination in *Boatmen's* case was apparently based upon a 1989 memo stating that Nelson should be given early retirement, but was not given a chance to correct his performance.

> Because Darnall's April 27, 1989, memo shows he had already decided that Nelson should be terminated and given early retirement and because Darnall did not in fact permit Nelson to correct his work performance, *the jury could reasonably infer that Darnall was hiding a motivation to fire Nelson because of his age.* Furthermore, Boatmen's proffered nondiscriminatory explanation was seriously undermined, not only by Nelson's evidence of his respectable performance but also by the conflicting testimony of two Boatmen's managers. . . .
>
> *It is clear that the jury believed Nelson's evidence and did not believe Boatmen 's proffered explanation that it fired Nelson because his performance has not been as good as other traders.* As we have stated, Nelson's evidence disproving Boatmen's proffered explanation is not necessarily sufficient. In this case, however, Nelson's evidence is strong enough, and Boatmen's case has been rendered weak enough, that the record as a whole is sufficient to support an

> inference that Boatmen's fired Nelson with a discriminatory age-related animus. *Under these circumstances, the jury reasonably could have drawn the inference that Boatmen's intentionally discriminated against Nelson on account of his age.*

26 F.3d at 802 (emphasis added).

In the instant case, the court erroneously stated that the *Boatmen's* case required Nelson to have direct proof of discriminatory statements. The panel stated, "Such evidence *must include* . . ." conduct or statements by persons involved in the decisionmaking process. (Ex. B. at 3-4).

The *Boatmen's* case *did not* require a standard so rigorous. It stated, "To meet this burden, Nelson must convince the fact finder that *Boatmen's* had an age-related discriminatory animus . . .", 26 F.3d at 800. This would involve statements by those decisionmakers, which would allow the fact finder to infer a discriminatory attitude. In the instant case, the jury did just that, but it was ignored by the panel.

This unprecedented additional proof requirement imposed on Nelson is in direct conflict with the Eighth Circuit's own prior ruling in *Rinehart v. City of Independence*, __ F.3d __, 65 FEP Cases 1548 (8th Cir. 1994), wherein it stated as follows:

> Similarly, we have never required plaintiffs bringing age discrimination claims to make as part of the fourth element of a prima facie case an "additional showing" that age was a factor in the termination decision other than in reduction-in-force cases. *See, e.g., Bashara v. Black Hills Corp.*, 26 F.3d

820, 823 (8th Cir. 1994); *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 800 (8th Cir. 1994); *Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161, 1165-66 (8th Cir. 1985). In *Bashara*, we specifically stated:

> In circumstances not involving a reduction in force, a plaintiff may make a prima facie case of age discrimination by establishing (1) that he is within the protected age group; (2) that he met applicable job qualifications; (3) that he was discharged; and (4) that, after his discharge, the position remained open and the employer sought applicants with similar qualifications to fill the position. *See, e.g., Holley*, 771 F.2d at 1165. In the context of a reduction in force, however, the fourth requirement creates difficulties. The plaintiff's position does not remain open; rather it is eliminated or combined with another position. *Id.* Accordingly, in *Holley*, we held that to establish a prima facie case in a reduction-of-force situation, the plaintiff must meet the first three requirements and "'must come forward with additional . . . evidence that age was a factor in his termination'". *Id.* at 1166 (quoting *LaGrant v. Gulf & Western Mfg. Co.*, 748 F.2d 1087, 1091 (6th Cir. 1984)).

> 26 F.3d at 823. As *Bashara* demonstrates, we have limited this "additional showing" that age was a factor in the plaintiff's termination to cases involving a reduction in force. Because there is agreement that this is not a reduction-in-force case, we conclude that *the district court erred by requiring Rinehart to make an additional showing that age was a factor* in his termination as part of his prima facie case.

65 FEP Cases at 1551.

It is important to point out that Nelson's case presented difficult issues for the court to resolve on damages as well, such as whether Social Security disability benefits had to be offset, the amount of front pay to be allowed, the taxability of the award, and whether the damages assessed as a willful violation were proper. Further, the jury found Nelson to be the victim of unlawful retaliation. Rather than address these issues, some of which it had not previously confronted, it appears the Eighth Circuit took the easy way out by vacating the jury verdict, even though that decision flew in the face of its own prior rulings.

Nelson is left to wonder what happened to the same court's ruling in *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104 (8th Cir. 1994), wherein it held as follows:

> (1) where the elements of a prima facia case are present, and (2) there exists sufficient evidence for a reasonable jury to reject the defendant's proffered reasons for its actions, then the evidence is sufficient to allow the jury to determine whether intentional discrimination has occurred, *and we are without power to reverse the jury's finding.*

17 F.3d at 1110 (emphasis added).

The *Gaworski* court also stated that a jury's disbelief of the employer's reasons could serve the additional purpose of establishing the discriminatory intent. It noted that in that situation, " . . . no additional proof of discrimination is required." 17 F.3d at 1110. Yet the Eighth Circuit required Nelson to produce what it determined to be additional necessary evidence, ignoring the fact that the jury had already reached that conclusion, in accord with *Gaworski*.

The court in *Gaworski* stated it was "without power" to reverse that jury's finding of unlawful age discrimination. The panel in this case had no problem in second-guessing the jury and then substituting its own findings of fact and rationale for that of the judge and jury. This is clearly wrong and a departure from all past precedent. *See Brown v. Stites Concrete, Inc.*, 994 F.3d 553, 557 (8th Cir. 1992) ("Our task on review is not to act as the trier of fact" even though we might have reached a different result).

The appeal in *Doyne v. Union Electric Co.*, 953 F.2d 447 (8th Cir. 1992), was in exactly the same procedural posture as the instant case. Doyne had won a jury verdict in an age discrimination case. However, in *Doyne*, the Eighth Circuit affirmed the jury's determinations, stating it would review such decisions as follows:

> We must: 1) consider the evidence in the light most favorable to Doyne; 2) assume that all conflicts in the evidence were resolved by the jury in Doyne's favor; 3) assume Doyne proved all the facts his evidence tends to prove; 4) give Doyne the benefit of all favorable inferences which may reasonably be drawn from the facts proved; and 5) affirm

> the denial of the j.n.o.v. motion if reasonable persons could differ as to the conclusions to be drawn from the evidence *See Frieze v. Boatmen's Bank of Belton*, 950 F.2d 538, 539 (8th Cir. 1991); *Gilkerson v. Toastmaster, Inc.*, 770 F.2d 133, 136 (8th Cir. 1985).

953 F.2d at 449.

This panel did none of the above. In fact, it departed totally from this standard of review, especially points 3 and 4, when it stated, "The fact that Mr. Nelson's replacement in North Dakota was significantly younger than he possesses, *in our view*, insufficient probative value to persuade a reasonable jury that Mr. Nelson was discriminated against." (Emphasis added). (Ex. B, p. 5).

The underlying decision presents the question of whether a plaintiff in the Eighth Circuit will have his case determined by the random draw of which three judges are assigned to hear his case, rather than a uniform standard grounded in Supreme Court precedent. That is simply not the way our federal laws are supposed to be interpreted.

The decision rendered by this panel relegates the jury in a pretext case to issuing an advisory opinion. A jury verdict means nothing if the appellate court can freely second-guess all findings of fact the jury made, and substitute its judgment for that of the people who saw the case and weighed the evidence. If there was any doubt that this jury felt that age was the motivating factor, that should have been dispelled by the finding of willfulness as well.

If past precedent means anything, if a jury is truly the finder of fact in these cases, if this Court's ruling in *Hicks* is to be consistently followed, then this decision must be reversed.

II.

THERE IS A SPLIT AMONG THE COURTS OF APPEAL IN APPLYING THE *HICKS* DECISION REGARDING THE AMOUNT OF PROOF NECESSARY TO SUPPORT A JURY VERDICT WHICH THIS COURT MUST ADDRESS.

The decision in the *Nelson* case appears to be in direct conflict with the recent decision in *Rhodes v. Guiberson Oil Tools, supra*. In *Rhodes,* the court's en banc decision reversed a determination by the three-judge panel, and reinstated the jury verdict that had been obtained by Rhodes at trial.

At trial, the company said that Rhodes actually was fired for inadequate job performance. The jury returned a verdict for Rhodes on his age discrimination claim but declined to find that Guiberson had committed a willful violation of the ADEA.

In a 2-1 ruling, the Fifth Circuit panel reversed the jury's verdict in favor of Rhodes and vacated the $188,866 judgment against Guiberson. The panel said that the jury lacked a rational basis for inferring age discrimination based on "generalized comments" by Guiberson's sales manager. Granting a petition by Rhodes, the full Fifth Circuit vacated the panel opinion and agreed to rehear the case.

Writing for the majority, Judges W. Eugene Davis and John M. Duhe, Jr. said that the circuit reviews jury verdicts under the standard set out in it opinion in *Boeing Co. v. Shipman,* 411 F.3d 365 (5th Cir. 1969), which held that a conflict in substantial evidence raises a jury question, and that a court may consider circumstantial as well as direct evidence in determining whether there is sufficient evidence to support a jury verdict.

The Supreme Court's decision in *Hicks* was deemed by the Court to be consistent with the *Boeing* formula for reviewing jury awards. It suggested that under *Hicks*, review of jury awards inevitably will "vary from case to case." The court said that Rhodes produced sufficient evidence to cast doubt on Guiberson's stated reason for terminating him and that the jury could reasonably find that it was a pretext for age bias. *See also, Barbour v. Merrill, supra,* discussed above.

There is a great deal of factual similarity between the Rhodes case and Nelson's trial. In his prima facie case, Rhodes showed that he was 56 years old when terminated, that Guiberson knew at the time of termination that Rhodes would be replaced, and that he was replaced within six weeks by a 42-year-old. When Guiberson contended at trial that Rhodes' job performance was subpar, Rhodes presented supporting testimony from customers and a former supervisor.

Similarly, Nelson presented testimony that he was 55 years old at the time of his discharge, and was replaced by a 42-year-old manager. Nelson also presented evidence from former and current Penney employees that he was a good and honest manager. Further, the alleged reasons for employee complaints and alleged performance deficiencies were exposed at his trial as being pretextual as well.

The *Rhodes* court interpreted the *Hicks* decision as follows:

> To sustain a finding of discrimination, circumstantial evidence must be such as to allow a rational factfinder to make a reasonable inference that age was a determinative reason for the employment decision. The factfinder may rely on all the

> evidence in the record to draw this inference of discrimination. In tandem with a prima facie case, the evidence allowing rejection of the employer's proffered reasons will often, perhaps usually, permit a finding of discrimination without additional evidence. Thus, a plaintiff can avoid summary judgment and judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complains. . . .

__ F.3d at __, 1996 U.S. APP. LEXIS at 9879.

The court then applied the standard to the facts presented by *Rhodes,* and concluded that there was sufficient proof to uphold the jury verdict.

> Based on this evidence, the jury was entitled to find that the reasons given for Rhodes' discharge were pretexts for age discrimination. The jury was entitled to find that Guiberson's stated reason for discharging Rhodes — RIF — was false. Additionally, the reason for discharge that Guiberson Oil proffered in court to meet Rhodes prima facie case was countered with evidence from which the jury could have found that Rhodes was an excellent salesman who met Guiberson Oil's legitimate productivity expectations. Viewing this

> evidence in the light most favorable to Rhodes, a reasonable jury could have found that Guiberson Oil discriminated against Rhodes on the basis of his age.

__ F.3d at __, 1996 U.S. APP. LEXIS at 9881.

The jury in the instant case also concluded that the reasons stated by Penney's for Nelson's dismissal were false. It also had evidence to conclude Nelson was an excellent store manager, based upon his evaluations, just as the jury in *Rhodes* concluded his discharge could not have been based on poor performance.

However, the Eighth Circuit opinion concluded that Nelson had to have direct evidence of age discrimination to make the jury verdict stand. This is plainly far beyond the burden of proof that this Court established in *Hicks*.

The *Rhodes* court correctly applied the burden of proof in a pretext claim. The *Nelson* court did not, as acknowledged by Judge McMillian's concurrence wherein he stated the majority *incorrectly applied a mixed motive text.*

Conversely, in *Fuentes v. Perskie*, __ F.3d __, 65 FEP Cases 890 (3rd Cir. 1994), that court held that the plaintiff cannot simply show that the employer's decision was wrong or mistaken. Rather, the plaintiff must show that such inconsistencies or contradictions are such that the factfinder would label them unworthy of credence.

It seems that the Third Circuit requires something more than pretext, comparable to what the Eighth Circuit did in this case. Such holdings are plainly contrary to this Court's holding in *Hicks,* and must be corrected to enable all parties to have a consistent application of the ADEA, regardless of the geographic area where they live.

Nelson is entitled to have his jury verdict given the same deference as was *Rhodes*. Based upon the facts and authorities set forth above, Nelson asks this Court to grant this Petition for Certiorari, and reverse the decision below, in order to insure that all appellate courts properly follow the *Hicks* decision in analyzing the proof needed to sustain a jury verdict.

CONCLUSION

The decision in the instant case is in conflict not only with the decision in *Hicks* and the other Courts of Appeals, but also with its own prior decisions. This ruling involves an important federal question that will impact future age discrimination trials, and is such a departure from the normal course of judicial proceedings that exercise of this Court's supervisory powers is warranted. Based on the facts and authorities set forth above, Nelson asks this Court to grant his Petition For Certiorari, and ultimately reinstate the judgment he received in the District Court, or, at a minimum, reverse the Eighth Circuit's decision on the liability issue on the age discrimination claim, and remand this case for a determination of the damages issues that were presented.

Respectfully submitted,

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APPENDIX A — ORDER DENYING REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED MARCH 4, 1996

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 95-1253

Dale Nelson,

Appellee,

vs.

J.C. Company, Inc.,

Appellant.

Appeal from the United States
District Court for the
Northern District of Iowa

The suggestion for rehearing en bane is denied. Chief Judge Richard S. Arnold and Judge Beam would grant the suggestion for rehearing en banc.

MCMILLIAN, Circuit Judge, specially concurring in the denial of the suggestion for rehearing en banc.

I do not disagree with the factual analysis of the panel opinion or the result reached in this case. On that basis I concur in the denial of the petition for rehearing en banc. As the panel opinion indicates, the evidence was insufficient to create a factual dispute as to whether age discrimination was a motivating factor in plaintiff's termination. In *Texas Dep't of*

Appendix A

Community Affairs v. Burdine, 450 U.S. 248 (1981) (*Burdine*), as clarified by *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993) (*Hicks*), the Supreme Court provided alternative methods by which employment discrimination can be proven. The Court observed that, when a defendant offers a nondiscriminatory reason for discharge, a plaintiff may submit sufficient evidence to permit a jury to find intentional discrimination in one of two ways: "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256 (emphasis added); *see Hicks*, 113 S. Ct. at 2749. As the panel opinion demonstrates, there was insufficient direct evidence of discrimination or indirect evidence of pretext to create an issue for the jury in this case. The Burdine standard still controls in those circumstances. It has been followed by all of the circuits, including our own circuit, in post-Hicks cases.

I write specially to note that the panel opinion is misleading in adopting the dicta set forth in *Nelson v. Boatmen's Bancshares Inc.*, 26 F.3d 796 (8th Cir. 1994) (*Boatmen's Bancshares*), which relies upon *Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444 (8th Cir. 1993), and *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 182 (2nd Cir. 1992).[1] The latter are mixed-motive cases in

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1. As the Seventh Circuit has pointed out in *Collier v. Budd Co.*, 66 F.3d 886, 893 n.11 (7th Cir. 1995), use of the *Boatmen's Bancshares* test in a pretext situation is inconsistent with recent decisions from most of the other circuits.

> This court has held that the Supreme Court in *Saint Mary's [Honor Ctr v. Hicks]* adopted a version of the "pretext-only" rule that allows (but does not require) a jury to find intentional discrimination if the employer has offered false or pretextual reasons for the

(Cont'd)

which direct evidence is required. Furthermore, *Boatmen's Bancahares* is a reduction-in-force case in which this court has traditionally required additional proof of age-animus beyond pretext. *See Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161, 1165-66

(Cont'd)

discharge. *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1123-24 (7th Cir. 1994); *see also Loyd v. Phillips Brothers Inc.*, 25 F.3d 518, 522 (7th Cir. 1994). Under the pretext-only rule, rejection of the employer's proffered reasons is sufficient to permit a finding of discrimination; "no additional proof of discrimination is required." *Anderson*, 13 F.3d at 1124, *quoting Saint Mary's [Honor Ctr. v. Hicks]*, __ U.S. at __, 113 S. Ct. at 2749; *see also Loyd*, 25 F.3d at 522 ("The trier of fact may infer intentional discrimination from its disbelief of the reasons put forward by the defendant and the elements of the prima facie case alone but is not required to do so.") The majority of other circuits to address this question have endorsed this version of the pretext-only rule. *See Waldron v. SL Industries, Inc.*, 56 F.3d 491, 495 (3rd Cir. 1995); *Walker v. NationsBank of Florida N.A.*, 53 F.3d 1548, 1557 (11th Cir. 1995); *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995), *cert. [granted in part*, 116 S. Ct. 805 (1996)]; *E.E.O.C. v. Ethan Allen, Inc.*, 44 F.3d 116, 120 (2nd Cir. 1994); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993); *but see Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 801 (8th Cir. 1994) (employee must present additional "evidence capable of proving that the real reason for his termination was discrimination based on age" in order to recover); *Rhodes v. Guiberson Oil Tools*, 39 F.3d 537, 543-45 (5th Cir. 1994) (simply disproving proffered reasons is not sufficient to allow finding of age discrimination), [*reh'd en banc*, 1996 WL 37846 (Jan. 31, 1996)].

(8th Cir. 1987); *cf. Hillebrand v. M-Tron Indus., Inc.*, 827 F.2d 363, 366-68 (8th Cir. 1987), *cert. denied*, 488 U.S. 1004 (1989). Neither of these tests applies to the *Burdine* analysis dealing with proof of pretextual reasons. As such, the panel opinion, in what is purportedly a pretext case, will cause continued confusion to the district courts and attorneys of this circuit.

The petition for rehearing by the panel is also denied.

March 4, 1996

A true copy.

Attest:
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED JANUARY 24, 1996

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 95-1253/1305

Dale Nelson,

Appellee/Cross-Appellant,

v.

J. C. Penney Company, Inc.,

Appellant/Cross-Appellee.

Equal Employment Opportunity Commission,

Amicus Curiae.

Appeals from the United States District Court for the Northern District of Iowa.

Submitted: September 13, 1995

Filed: January 24, 1996

Before LOKEN, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

Appendix B

Dale Nelson began working for J. C. Penney department stores in 1960. In 1983, he became the manager of a store in Iowa. In late 1990, he was transferred to become the manager of a smaller store in North Dakota. Four and a half months later, shortly after he turned 55, he was fired.

Mr. Nelson sued Penney in federal court in Iowa in late 1991, alleging age discrimination, retaliatory discharge (he had filed an age discrimination charge with the appropriate administrative agency a month before he was fired), and discharge in violation of the Employee Retirement Income Security Act (ERISA) (all under federal law), and disability discrimination, invasion of privacy, intentional infliction of emotional distress, and defamation (under Iowa law).

At an eight-day mixed jury/bench trial in mid-1993, the trial court dismissed the claims of invasion of privacy and intentional infliction of emotional distress for failure to state a claim. The trial court did not instruct the jury on the claim of defamation. The jury then found for Mr. Nelson on the age discrimination and retaliatory discharge claims. The trial court found for Penney on the claims of discharge in violation of ERISA and disability discrimination. *See Nelson v. J. C. Penney Co.*, 858 F. Supp. 914 (N.D. Iowa 1994). After denying post-trial motions, the trial court entered judgment for Mr. Nelson in the amount of approximately $930,000. Both sides appeal. We affirm in part and reverse in part and remand the case for the entry of the appropriate judgments.

I.

Penney contended that Mr. Nelson was fired, after repeated warnings, because of an abrasive and intimidating management

style. Mr. Nelson contended that Penney's stated reason for firing him was merely a pretext for age discrimination. The trial court denied Penney's motions for judgment as a matter of law, both at trial and post-trial, on the age discrimination claim. Penney appeals those denials. In reviewing the denial of a defendant's motion for judgment as a matter of law in an age discrimination case submitted to a jury, we "focus on the ultimate factual issue of whether the employer intentionally discriminated against the employee on account of age." *Nelson v. Boatmen's Bancshares Inc.*, 26 F.3d 796, 800 (8th Cir. 1994). That process requires an evaluation of three different questions. *Id.* at 801.

First, we determine whether the plaintiff established a *prima facie case — i.e.*, that he was "within the protected age group, . . . [that] he was performing his job at a level that met his employer's legitimate expectations, . . . [that] he was discharged, and . . . [that] his employer attempted to replace him." *Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 448 (8th Cir. 1993). For the purposes of this appeal, we assume that Mr. Nelson established a *prima facie* case and thus created a presumption of unlawful age discrimination by Penney. *Nelson*, 26 F.3d at 801. The existence of that presumption placed an obligation upon Penney to rebut it, if possible. *Id.*

To rebut a presumption of unlawful age discrimination created by a plaintiff's *prima facie* case, an employer has to offer reasons for its actions that, if believed by a jury, would allow the jury to conclude that the plaintiff's age was not the reason for his termination. *Id.* Penney did so. There was evidence that many store managers older than Mr. Nelson were still working and had even been promoted. There was additional, and considerable, evidence of Mr. Nelson's difficulties in dealing with his

employees in Iowa and of a continuation of those difficulties after his transfer to North Dakota (there was, moreover, no evidence that Penney failed to discipline younger store managers with the same or similar difficulties). Finally, both of the supervisors who participated in the decision to fire Mr. Nelson denied that his age was a factor in that decision.

Because Penney presented evidence of reasons other than age for its decision to terminate Mr. Nelson, it is considered to have rebutted his *prima facie* case. *Id.* The presumption of unlawful age discrimination therefore drops out of the case, *id.*, and we evaluate, last, only whether Mr. Nelson presented evidence "capable of proving that the real reason for his termination was discrimination based on age." *Id.* Such evidence must include " 'conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude' " of an extent " 'sufficient to permit the [jury] to infer that that attitude was more likely than not a motivating factor in the employer's decision.' " *Id.* at 800, quoting *Ostrowski v. Atlantic Mutual Insurance Companies*, 968 F.2d 171, 182 (2d Cir. 1992). With that standard in mind, we examine the evidence offered by Mr. Nelson as the basis for his age discrimination claim. *Nelson*, 26 F.3d at 802.

We have read the entire trial transcript with care. As far as we can tell, Mr. Nelson presented four specific bases for his claim of age discrimination. The first was the fact that when he was transferred to North Dakota, and again when he was fired, his replacements were younger than he was. Then, late in 1990, around the time that Mr. Nelson was transferred to the store in North Dakota, the district manager for Iowa (Mr. Nelson's prior supervisor) called the district manager for North Dakota (Mr.

Nelson's new supervisor) to advise him about Mr. Nelson's background. During that call, the district manager for North Dakota made notes, among which he included the information that Mr. Nelson was 54 years old. That inclusion was the second basis for Mr. Nelson's age discrimination claim. At a lunch in early 1991 attended by Mr. Nelson, his wife, the district manager for North Dakota, and two other Penney employees, the district manager told Mr. Nelson that he knew Mr. Nelson's age. That statement was the third basis for Mr. Nelson's age discrimination claim. Finally, although Mr. Nelson received negative comments on his management style from various supervisors earlier in his career, he was never otherwise disciplined or transferred because of them until he was 54 years old.

It is true that the replacements for Mr. Nelson at both stores were younger than he was; at the Iowa store, however, the age difference between Mr. Nelson and his successor was only one month. It is also true that the district manager for North Dakota wrote down Mr. Nelson's age when discussing him with the district manager for Iowa. But the fact that Mr. Nelson's replacement in North Dakota was significantly younger than he possesses, in our view, insufficient probative value to persuade a reasonable jury that Mr. Nelson was discriminated against. Such a fact is consistent with age discrimination, but it cannot alone support a reasonable inference of it. Nor do we believe that the fact that the district manager knew Mr. Nelson's age could furnish the basis for a reasonable inference that his age was a basis for his termination. A fact finder may not simply convert a condition that is necessary for a finding of liability (here, knowledge of a plaintiff's age) into one that is sufficient for such a finding.

We have said that in "some cases, evidence that an

employer's proffered nondiscriminatory explanation is wholly without merit or obviously contrived might serve double duty, . . . permitting an inference that age discrimination was a motivating factor in a plaintiff's termination." *Id.* at 801. This is not such a case. There was no conflicting testimony or other substantial evidence of deviousness on the part of the employer, *see id.* at 802, from which a reasonable fact finder could conclude that the employer's proffered reasons for Mr. Nelson's termination were pretextual. *See also Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104, 1110 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 355 (1994). We do not think that the simple fact that the employer's testimony is necessarily self-interested is enough under our previous cases to allow the jury to find that the employer's proffered reasons were pretextual. If it were, then any case in which the plaintiff makes a prima facie case is a submissible one because it must go to the jury whether or not the employer produces bona fide reasons for its actions — and we have never held that. Mr. Nelson's personnel file did contain occasional comments from earlier supervisors about his need to improve his relationships with his employees. There is no evidence in the record, however, showing that any of those remarks was preceded by the number, intensity, or scope of employee complaints that occurred in the year before Mr. Nelson was fired.

In view of all of these circumstances, and considering the insubstantial character of the evidence presented with respect to age discrimination, we cannot agree with the trial court that Mr. Nelson established a submissible case that age " '*actually motivated*' " Penney's decision to fire him. *Nelson*, 26 F.3d at 800, quoting *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1706 (1993) (emphasis supplied in *Nelson*). We see no evidence " 'directly reflecting the alleged discriminatory attitude.' "

Nelson, 26 F.3d at 800, quoting *Ostrowski*, 968 F.2d at 182. We therefore vacate the judgment on the age discrimination claim and remand the case for the entry of judgment for Penney on that claim.

II.

The evidence of retaliatory discharge was even less substantial, consisting only of the facts that Mr. Nelson was fired a month after filing an age discrimination charge with the appropriate administrative agency and that both of the supervisors involved in firing Mr. Nelson knew of that charge. There is no evidence in the record that others who filed age discrimination charges were fired, that Mr. Nelson's supervisors discussed the filing with each other, or that either of them even commented to Mr. Nelson on that filing. There was considerable evidence, moreover, that Mr. Nelson was reprimanded several times and was given a final warning about the status of his job before his supervisors knew of the age discrimination charge.

In light of all of these circumstances, we cannot agree with the trial court that the mere coincidence of timing established a submissible case of retaliatory discharge. *See, e.g., Caudill v. Farmland Industries, Inc.*, 919 F.2d 83, 86-87 (8th Cir. 1990) (close temporal proximity between filing of age discrimination charges and firing of plaintiff was only a "slender reed of evidence" for which "rank speculation" would be required to assume causal connection between the two events, in light of other evidence presented); *see also Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 501 (3d Cir. 1991), *cert. denied*, 502 U.S. 940 (1991) ("inference based on timing alone" was insufficient in light of other evidence presented). We therefore vacate the judgment on the retaliatory discharge claim and remand the case for the entry of judgment for Penney on that claim.

Appendix B

III.

Mr. Nelson cross-appeals the trial court's judgment for Penney on his claims of discharge in violation of ERISA and disability discrimination. We have carefully read the entire trial transcript. We see no basis for vacating those judgments.

IV.

Mr. Nelson's claim under state law for invasion of privacy was based on a supervisor's opening of Mr. Nelson's locked desk at the North Dakota store in his absence to obtain his personnel file. The trial court dismissed that claim on the first day of trial, stating that the alleged tort had occurred in North Dakota and that no such tort is or would be recognized in North Dakota. Mr. Nelson cross-appeals that dismissal.

The North Dakota Supreme Court has acknowledged that in the states where the tort of invasion of privacy is recognized, it usually takes one or more of four forms — "(1) appropriation of a name or picture for commercial purposes without written consent; (2) intrusion upon one's solitude or seclusion; (3) public disclosure of private information which is not necessarily defamatory; and (4) placing a person in a false light . . . in otherwise legitimate news stories." *City of Grand Forks v. Grand Forks Herald. Inc.*, 307 N.W.2d 572, 578 n.3 (N.D. 1981). In at least two cases, the North Dakota Supreme Court has assumed for the sake of argument that a cause of action may exist for commercial appropriation of a name without consent but has sidestepped the question of the actual existence of that tort by finding consent to use of the name. *See American Mutual Life Insurance Co. v. Jordan*, 315 N.W.2d 290, 296 (N.D. 1982), and *Volk v. Auto-Dine Corp.*, 177 N.W.2d 525, 529 (N.D. 1970). In at

least one case, that court has assumed for the sake of argument that a cause of action may exist for public disclosure of private information but has sidestepped the question of the actual existence of that tort by finding no evidence of proximate cause. *See Schleicher v. Western State Bank*, 314 N.W.2d 293, 296 (N.D. 1982).

We have found no authority, however (and have been directed to none), that would allow us to conclude that North Dakota might recognize a cause of action for the type of intrusion into a person's solitude or seclusion of which Mr. Nelson complains. Indeed, although it has been given a number of opportunities to hold that some types of invasion of privacy are actionable, the Supreme Court of North Dakota has consistently refused to do so. We believe that the trial court therefore correctly decided that this studied reluctance does not bode well for the acceptance of this kind of cause of action in North Dakota in the future. Accordingly, we decline to disturb the trial court's ruling with respect to the claim for invasion of privacy.

In his reply brief, Mr. Nelson argues that Penney never pleaded the applicability of North Dakota law and, therefore, that the law of Iowa (where the case was tried) should have been applied. That argument might prevail in the Iowa state courts (a question upon which we express no opinion), but Mr. Nelson sued in federal court, where pleadings are governed by the federal rules. *See, e.g., Bank of St. Louis v. Morrissey*, 597 F.2d 1131, 1134-35 (8th Cir. 1979); *see also Asay v. Hallmark Cards Inc.*, 594 F.2d 692, 698-99 (8th Cir. 1979) ("a federal court cannot be bound by a state's technical pleading rules"). "The federal courts are required to take judicial notice of the laws of every state of the union. Consequently, it is not necessary to plead state law, whether it be the forum state's law or the law of

another state." *See* 5 C. Wright and A. Miller, *Federal Practice and Procedure:* Civil 2d § 1253 at 357-58 (1990). Since Mr. Nelson does not contend that the trial court interpreted Iowa conflicts law improperly, we reject the argument that Penney's failure to plead the applicability of North Dakota law deprives Penney of the benefit of that law on the claim for invasion of privacy.

V.

Mr. Nelson had serious health problems beginning in mid-1989. His claim under state law for intentional infliction of emotional distress was based on Penney's transferring him to North Dakota "with wanton disregard for [his] physical and mental health." The trial court dismissed that claim on the first day of trial, stating that because Mr. Nelson had no expert testimony to offer on the question of emotional distress, he could not prevail, as a matter of law. Mr. Nelson cross-appeals that dismissal.

In dismissing this claim, the trial court relied on *Vaughn v. Ag Processing, Inc.*, 459 N.W.2d 627, 636 (Iowa 1990) (*en banc*), in which the Iowa Supreme Court held that when physical problems are alleged to have derived from emotional distress, expert testimony is required. We are dubious about the applicability of *Vaughn* in the absence of claims for physical problems consequent to emotional distress (and Mr. Nelson evidently does not allege any such physical problems). We note, however, that Mr. Nelson made no argument in the trial court (or, for that matter, in his briefs on cross-appeal) that *Vaughn* did not apply or that his claim for intentional infliction of emotional distress could survive based solely on his subjective reaction to his transfer. Indeed, Mr. Nelson's lawyer stated at trial, with

respect to *Vaughn*, that he had no "contrary authority" and that *Vaughn* appeared to control ("that appears to be the Iowa law as far as what the cases have said"). Such a concession amounts, in our view, to a waiver (or an abandonment) of Mr. Nelson's claim for intentional infliction of emotional distress.

On cross-appeal, moreover, Mr. Nelson offers arguments based on the sufficiency of the evidence on his claim for intentional infliction of emotional distress. He made none of those arguments in the trial court, as far as we can tell. Under all of these circumstances, we decline to disturb the trial court's ruling on Mr. Nelson's claim for intentional infliction of emotional distress. *See, e.g., Pedico v. P.A.M. Transport Inc.*, 60 F.3d 1300, 1304 (8th Cir. 1995).

VI.

Mr. Nelson's defamation claim was based on the alleged compelled self-publication by Mr. Nelson to two of his employees of statements about himself — but written by Penney — that Mr. Nelson considered defamatory. He submitted two proposed jury instructions on defamation before trial. After the close of the evidence, the trial court gave to the parties a set of proposed jury instructions. No instruction on defamation was included in that set.

During the jury instructions conference, the trial court asked the parties to specify, with respect to the set given to them, both the instructions objected to and any instructions omitted but still requested. The lawyer for Mr. Nelson asked for the addition of two jury instructions, neither of which related to defamation, and stated that he had "no other problems" with the trial court's set. On at least five other occasions, Mr. Nelson's lawyer repeated

that he was "done," that he had "nothing else," that the trial court's set seemed "fine," that he could not "think of anything else," and that he had no further "problems or any record . . . to make . . . or anything else" to bring up with the trial court.

By his lawyer's explicit acceptance of the trial court's proposed jury instructions and his failure to offer during the jury instructions conference any additional instructions on defamation, Mr. Nelson abandoned his defamation claim. We therefore reject his argument on cross-appeal that the defamation claim should have been submitted to the jury.

VII.

For the reasons stated, we affirm the trial court with respect to all of Mr. Nelson's claims except age discrimination and retaliatory discharge. We vacate the judgments on those claims, as well as the associated judgments awarding attorney's fees, and remand the case for the entry of judgment for Penney on all claims.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, WESTERN DISTRICT FILED APRIL 26, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

NO. C91-4108

DALE NELSON,

Plaintiff,

vs.

J.C. PENNEY COMPANY, INC.

Defendant.

MEMORANDUM OPINION AND ORDER

A trial was held in this matter. The first and second causes of action (whether Plaintiff was discharged based on unlawful age discrimination and whether Plaintiff was discharged unlawfully in retaliation for his filing of an age discrimination charge with the Iowa Civil Rights Commission) were tried to a jury. The third and fourth causes of action (whether the Plaintiff was discharged in violation of Section 510 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. Section 1140, and whether the Plaintiff was discharged in violation of the Iowa Civil Rights Act (ICRA)) were tried to the Court. The jury returned its verdict, finding that Defendant willfully and unlawfully terminated Plaintiff because of Plaintiff's age, and in unlawful retaliation for his filing of a discrimination charge.

Appendix C

The Court now enters its findings of fact and conclusions of law regarding the third and the fourth causes of action, and what, if any, damages Plaintiff should receive. After careful consideration, the Court upholds the jury verdict (finding willful discharge in violation of the ADEA) and makes its own finding that Defendant J.C. Penney did not violate ERISA, nor did it violate the ICRA when it discharged the Plaintiff. Based upon the Jury's verdict, it is therefore ordered, adjudged, and decreed that Plaintiff have a front pay judgment against the Defendant in the amount of $569,503.20, less set-offs for both the Social Security disability payments Plaintiff has received from the date of his termination to the date of this Order and for the disability payments Plaintiff has received from the Defendant, plus interest as provided by law, and a back pay award of $703,064.50 with no prejudgment interest, reasonable attorney fees and the costs of this action.

A. FINDINGS OF FACT

1. Defendant hired Plaintiff on October 10, 1960. Over the years, Plaintiff worked for Defendant in a variety of managerial positions at several midwest J.C. Penney stores. During the 1960s, Plaintiff was disciplined once for personnel problems relating to his store management.

2. Plaintiff became the manager of Defendant's Sioux City store in 1983.

3. Between 1983 and 1988, Plaintiff consistently received favorable evaluations for his performance as Defendant's Sioux City store manager.

4. In April, 1988, Plaintiff's subordinates alerted Plaintiff's

superiors that they were unhappy with Plaintiff's management style, particularly his employee relations. Defendant responded by sending Plaintiff's immediate supervisor, District Manager Ted Stewart, to Sioux City to discuss these personnel issues with Plaintiff. District Manager Stewart did not go into detail about the complaints lodged against Plaintiff, but urged Plaintiff to improve his employee relations and management style.

5. On December 13, 1988, Plaintiff met with District Manager Stewart and Regional Personnel Manager Jim Fike to discuss Plaintiff's management style and "people issues." Again, Plaintiff was not given specific information about the employee complaints lodged against him, but was urged to improve.

6. On December 21, 1988, Plaintiff was summoned by District Manager Stewart and Regional Personnel Manager Fike to Defendant's district offices in Schaumburg, Illinois, and was given an oral warning regarding his apparent failure to comply with the company's directives about improving his management style.

7. On February 9, 1989, Plaintiff mailed a letter to Defendant's Senior Regional Personnel Relations Attorney Alan Butler. In that letter, he denied any misconduct on his part.

8. On March 21, 1989, District Manager Stewart and Plaintiff had a "clear the air" meeting where they discussed issues relating to Defendant's December, 1988 disciplinary actions against Plaintiff as mentioned in paragraphs 5 and 6 above. As a result of that "clear the air" meeting,

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Defendant discharged a second-level manager at the Sioux City store, with whom Plaintiff had prior conflicts. That second-level manager was never replaced. During this time, Defendant suggested that Plaintiff attend management training courses to help him improve his managerial style, but Plaintiff declined to do so.

9. In June, 1989, Plaintiff was diagnosed with colon cancer and soon thereafter underwent surgery for that cancer. Plaintiff recuperated through August, 1989 without working, and received full pay while he recovered. Plaintiff's medical bills were paid by Defendant's health insurance plan.

10. During his recovery, Plaintiff kept District Manager Stewart apprised of his medical condition.

11. Plaintiff, on November 22, 1989, received a favorable performance evaluation and a salary increase. Plaintiff also received an "A" rating as a store manager which made him eligible for either a promotion or a transfer to a larger store. This meant that he was considered to be one of J.C. Penney's most qualified store managers.

12. Through the next several months, Plaintiff continued working, though he was still receiving treatment for his cancer surgery. On April 10, 1990, he received another salary increase and heard nothing about any personnel problems that he might have been having at the Sioux City store.

13. From May 30, 1990 through June 10, 1990, Plaintiff was hospitalized for the repair of five abdominal hernias, for

gastrointestinal problems, and for complications arising from those surgeries. Plaintiff's medical bills were paid by the Defendant's health insurance carrier and Plaintiff continued to receive full pay while he recuperated.

14. During his recovery from the summer 1989 and 1990 surgeries, Plaintiff was never pressured to return to work. When he did return, he didn't ask for any accommodations (i.e. a light work load, etc.) to aid in his recovery, though he could work at his own pace since his schedule only required 40 hours of work per week, without specific hours.

15. Plaintiff returned to work full-time prior to the end of July, 1990.

16. In July and August, 1990, Defendant's corporate headquarters received two anonymous letters from Plaintiff's Sioux City subordinates — one dated July 10, 1990 and one dated July 29, 1990. These letters referred to low morale among employees in the Sioux City store and to other personnel-related issues which were blamed on Plaintiff.

17. As a result of those letters, Defendant's Senior Regional Personnel Relations Attorney Butler, along with District Personnel Manager Tom Wright, conducted a "personnel audit" at the Sioux City store on August 14 and 15, 1990. During the "audit," Plaintiff was asked to leave the store so that the employees could speak frankly and without fear of reprisal. Plaintiff was instructed not to interrogate any associates about what they said during the audit, nor to retaliate against anyone who might have met with Mr. Butler and Mr. Wright.

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18. The personnel audit, although conducted as an "open forum" for discussions about *any* problems at the store, was really being held to determine whether the allegations in the anonymous letters were true, and to determine the actual severity of the allegations contained in those letters.

19. The audit was conducted as a one-on-one discussion between store employees and either Mr. Butler or Mr. Wright. Each man conducted audits of different departments. During these discussions, Wright and Butler asked general questions, such as: how are things going at this store? Do you have any concerns you would like to discuss?

20. In all, approximately 20 current employees were interviewed, as were five former employees. Seven of the 20 were current management employees. Each of the employees was told that if Plaintiff interrogated them, or in any way tried to find out from them what had been discussed at the audit, they were to report this to the district manager at once.

21. As a result of these discussions, on August 31, 1990, District Manager Stewart and Regional Personnel Manager Fike administered a "written corrective interview" to Plaintiff. This type of interview is a disciplinary action, more severe than a verbal warning, and is generally considered to be one of the last steps that Defendant takes before terminating an employee.

22. At the "written corrective interview," Plaintiff received a proposed script. This script was Defendant's attempt at a speech to be read by Plaintiff to his subordinates, which

outlined what their complaints were and which emphasized his willingness to make appropriate changes and to be more sensitive to their feelings. Plaintiff was told that if he wanted to remain in the Sioux City store, he would have to make a speech to his subordinates which contained the basic overall meaning and content of the proposed script. Plaintiff was also told that he was not to discuss the existence of the script with anyone, but that he could make pre-approved revisions to the script.

23. Plaintiff never raised his medical condition as an excuse or justification for his personnel problems, and Defendants never suggested that his medical condition had anything to do with their decision to have him read the speech.

24. After receiving the script and before making any changes to it, Plaintiff discussed its contents with two of his management associates — Dennis Bostow and Tom Chrystal. This conversation was directly contrary to the orders Plaintiff had been given by his superiors, Mr. Fike and Mr. Stewart. Plaintiff met with Mr. Bostow and Mr. Chrystal because during his medical absences those two men had been responsible for personnel matters at the Sioux City store, and he felt that they could enlighten him as to the personnel matters listed in the script. He also met with them to determine if the script accurately depicted other employees' perceptions of him. During the conversation, Plaintiff told Mr. Bostow and Mr. Chrystal that he did not believe the allegations contained in the prepared speech were true. After being asked by Plaintiff for his opinion, Mr. Chrystal advised Plaintiff not to read the script if Plaintiff did not believe that its contents were correct.

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25. In accordance with the order he had received at the personnel audit, Mr. Bostow informed District Manager Stewart that Plaintiff had interrogated him about matters relating to the audit when Plaintiff discussed with him the proposed script.

26. After being contacted by Mr. Bostow, District Manager Stewart, accompanied by Regional Personnel Manager Fike, met with Plaintiff on September 12, 1990 and informed him that his discussion with Mr. Bostow and Mr. Chrystal was a breach of the order they had given him not to contact anyone concerning the "audit," and that because he had done so he had destroyed his chance to remain as the Sioux City store manager. They were especially upset that during his discussions with Mr. Bostow and Mr. Chrystal — two high level managers — he had intimated that the allegations contained in the proposed script were not accurate. Mr. Stewart and Mr. Bostow felt that such a contention destroyed any chance that a later speech made to the "management team" would be credible. Plaintiff was informed that the consequence of his discussing the speech was a reassignment to a smaller store.

27. On September 14, 1990, Plaintiff was informed that he had been transferred from Sioux City to Defendant's relatively smaller Bismarck, North Dakota store. However, Plaintiff's compensation was not lowered. He was informed that his annual salary would remain at approximately $92,270.

28. On October 1, 1990, Plaintiff reported to work at the Bismarck store. On October 2, 1990, Plaintiff met with District Manager John Henderson, who gave Plaintiff an

orientation tour of the store. During the tour, District Manager Henderson informed Plaintiff that he was aware of Plaintiff's past problems in Sioux City, but he assured Plaintiff that he would be given a "clean slate" in Bismarck. At trial, District Manager Henderson testified that he did not mean to suggest that Plaintiff's problems in Sioux City would be erased from his employment files, but that by telling Plaintiff he would be given a clean slate, Henderson meant to encourage Plaintiff to try his best to work cooperatively and constructively with his new subordinates, and to make Plaintiff feel welcome.

29. Plaintiff had a different interpretation of what was meant by "clean slate." He thought that his prior problems in Sioux City would be erased from his employment files, and that those problems would have no bearing on any decisions relating to his employment with Defendant from that day forward.

30. On December 21, 1990 an anonymous letter critical of Plaintiff's management style at Bismarck was received by District Manager Henderson.

31. On January 9, 1990, District Manager Henderson came to Bismarck to meet with Plaintiff regarding that letter. Although Plaintiff felt that he could refute the allegations of that letter, Mr. Henderson did not give Plaintiff a chance to respond. Mr. Henderson left Bismarck without telling the Plaintiff how he would deal with the situation.

32. On January 17, 1991, Plaintiff filed a charge of age and disability discrimination with the Iowa Civil Rights Commission against Defendant, alleging that Defendant's

treatment of him during his tenure as Sioux City store manager amounted to unlawful discrimination against him.

33. On January 18, 1991, Plaintiff met with District Manager Henderson in Minneapolis, MN. At that meeting, Plaintiff was given a "final corrective interview," which is the most severe disciplinary action the company gives prior to termination. During the interview, Plaintiff was told that the anonymous letter received by Mr. Henderson contained the same types of allegations as those which led to his transfer from Sioux City, and that if Defendant received further, similar complaints, Plaintiff would be terminated. Plaintiff was not given a chance to explain his side of the story at this meeting, nor was he given an opportunity to refute the allegations in the letter.

34. During that January 18, 1991 meeting in Minneapolis, Plaintiff informed District Manager Henderson that he had previously filed a charge of discrimination against Defendant in Iowa. Plaintiff never used his medical condition as an excuse or justification for any of the allegations contained in the anonymous letter.

35. On January 18, 1991, Defendant explained to Plaintiff its newly-enacted management incentive pay plan which included a stock option plan whereby store managers could purchase stock at a fixed option rate which could be exercised for several years.

36. By late January, 1991, Defendant began compiling information in order to address the Iowa Civil Rights Commission's inquiries about Plaintiff's discrimination charge. One portion of the required information was a

personnel file which was kept in Plaintiff's locked desk in his Bismarck office.

37. On February 1, 1991, on a day when the Plaintiff was not working, Regional Personnel Attorney Alan Butler ordered that a Bismarck J.C. Penney employee break open Plaintiff's desk and retrieve the personnel file.

38. On February 4, 1991, Plaintiff held a meeting with the store's managers at which he outlined their annual Management By Objective (or "MBO") goals.

39. On February 8, 1991, District Manager Henderson received another letter from Bismarck store employees complaining about Plaintiff's management style. This letter, dated February 6, 1991, (Exhibit M-1) was signed by each of the Bismarck store's department managers.

40. On February 15, 1991, District Manager Henderson and Regional Personnel Manager Fike terminated Plaintiff. After they announced that he would be terminated, they began to read the February 6 complaint letter to him, but he left the office before the reading could be completed. At no time prior to the announcement of his termination was Plaintiff ever given an opportunity to defend himself against the allegations in the February 6 letter.

41. During that meeting, Plaintiff never suggested that his medical condition may have affected his job performance. At the same time, District Manager Henderson and Regional Personnel Manager Fike never suggested that their decision to terminate him had anything to do with his medical condition.

42. At the time of his termination, Plaintiff's cancer treatment was completed. No further surgeries were scheduled.

43. The jury verdict in this case indicated that Plaintiff's age was a determining factor in Defendant's decision to discharge Plaintiff. The jury concluded, as well, that Plaintiff's filing of a charge of discrimination with the Iowa Civil Rights Commission was a determining factor in the termination decision. Moreover, the verdict made clear that the jury believed that Defendant's actions against Plaintiff were willful.

44. Plaintiff, while employed by Defendant, participated in several ERISA-covered plans: a pension plan; a medical/dental insurance plan: a "savings, profit sharing and stock purchase" plan; a long-term disability insurance plan; and a life insurance plan.

45. After termination, Plaintiff remained vested in the Defendant's pension plan. He receives slightly in excess of $1,000 per month from that plan and will continue to receive that payment as long as either he or his wife is alive.

46. Termination did not affect Plaintiff's medical or dental insurance coverage, though he pays a slightly higher fee for the services. For insurance purposes, he is not treated as a terminated employee. He is treated as a retired employee, paying about $8 per month more than active employees.

47. Termination did not affect Plaintiff's interest in the savings plan. He remains vested. Although he is not eligible for future participation in the plan, the amounts which he added to it remain his.

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48. Because the Social Security Administration determined that Plaintiff has been "disabled" since his last day of employment with Defendant, Plaintiff is receiving long-term disability from Defendant's plan and will continue to receive it so long as he is eligible. This is true, despite the fact that former employees of Defendant are not entitled to long-term disability insurance benefits.

49. Termination did not affect Plaintiff's eligibility for life insurance benefits. Again, he is being treated as a "retiree" for life insurance purposes. And, like a "retiree," he receives less life insurance coverage than an active employee. He has not needed to spend any money purchasing substitute coverage on the open market.

50. Plaintiff is also considered a "retiree" for purposes of receiving a J.C. Penney Employee Discount on items he purchases from any of the Defendant's stores.

51. After termination, Plaintiff made no realistic attempt to obtain alternative employment. His only act in that regard was to fill out an application with the Job Services Corporation of Iowa. He never applied to work for any of the Defendant's competitors. However, given his age and his medical condition, he was and is not likely to find comparable employment at a comparable wage with comparable benefits, and he has, therefore, done as much as can be expected to mitigate his damages.

52. As mentioned, after Plaintiff was terminated, he applied to the Social Security Administration (SSA) for disability benefits. After reviewing Plaintiff's application, the SSA determined that Plaintiff was totally disabled as of his last

day of his employment with Defendant. In making its determination that Plaintiff was totally disabled, the SSA relied on assertions to that effect made by Plaintiff and others speaking on Plaintiff's behalf.

B. CONCLUSIONS OF LAW

1. Plaintiff's ERISA discrimination claim (Third Cause of Action)

It is uncontested and this Court is persuaded that Defendant, J.C. Penney Company, was an "employer" under ERISA, that Defendant offered to its employees an ERISA "employee benefit plan," and that Plaintiff, Dale Nelson, was an ERISA employee.

Under Section 510 of ERISA, 29 U.S.C. Section 1140, it is unlawful "for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan. . . or *for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . .* " (emphasis added). Unlawful ERISA discrimination is shown either by direct proof (*see Carter v. City of Miami,* 870 F.2d 578 (11th Cir. 1989)) or by showing a scheme of discrimination through the use of circumstantial evidence as established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) and restated in *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 253-54 (1981).

Evidence is direct when it is sufficient to prove discrimination without inference or presumption. *Carter,* 870 F.2d, at 581-82. Throughout the trial in the case at bar, Plaintiff conceded that he had no direct evidence of discrimination.

Therefore, this Court must determine whether circumstantial evidence presented at trial established discrimination by the Defendant against the Plaintiff, in violation of ERISA.

Under *McDonnell Douglas*, in order to show circumstantial evidence of unlawful ERISA discrimination, the Plaintiff must first demonstrate by the preponderance of the evidence a *prima facie* case of discrimination. *Burdine*, 450 U.S. at 252-53. *See also, Clark v. Coats & Clark Inc.*, 990 F.2d 1217, 1223 (11th Cir. 1993). In the context of an ERISA Section 510 claim (a claim that there was a violation of 29 U.S.C. Section 1140) alleging unlawful discharge, a plaintiff makes a *prima facie* case of discrimination by showing that he (1) is entitled to ERISA's protection, (2) was qualified for the position, and (3) was discharged under circumstances that give rise to an inference of discrimination. *Clark*, 990 F.2d, at 1223, *quoting Turner v. Sherina-Plough Corp.*, 901 F.2d 335, 347 (3d Cir. 1990).

An employee is entitled to ERISA's protection when he is a participant in a plan covered by ERISA. Since the Court has already concluded that the Defendant's plan was covered by ERISA and that the Plaintiff was an employee of the Defendant's who participated in that plan, the Court is persuaded that the first *Clark* prong was met. Regarding the second prong of the *Clark* analysis, the Court concludes that the Defendant was qualified for the position he held prior to his termination. Even though he was sick and ornery, he knew how to run a store and had done so well for years. The Court notes, particularly, that Defendant consistently gave the Plaintiff nearly perfect ratings regarding his performance as a manager, particularly in the areas of store productivity and reduction of "shrinkage." The Court also notes that these same ratings were given to Plaintiff prior to or contemporaneous with the complaint letters received by Defendant's upper-management.

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In regard to the third *Clark* prong, whether or not Plaintiff was discharged under circumstances that give rise to an inference of discrimination, this element can only be satisfied in favor of Plaintiff if he introduced evidence that would lead the Court to conclude that interference with ERISA rights was a motivating factor in his termination. *Turner,* 901 F.2d, at 348. Such a showing requires more than merely introducing evidence that, as a result of the termination, Plaintiff was deprived of the opportunity to accrue more benefits. *Clark,* 990 F.2d, at 1224 (*quoting Clark v. Resistoflex Co.*, 854 F.2d 762, 771 (5th Cir. 1988)). Instead, an employee (Plaintiff) must show that his termination resulted in a substantial savings to Defendant in terms of benefit expenses. *Dister v. Continental Group Inc.*, 859 F.2d 1108, 1115 (2d Cir. 1988). This was not shown.

Because some loss of benefits is an inevitable consequence of nearly every employment termination, an essential element in an ERISA Section 510 case is "to show that an employer was at least in part motivated by the specific intent to engage in activity prohibited" by the statute. *Dister*, 859 F.2d, at 1111. "No ERISA cause of action lies where the loss of pension benefits was a mere consequence of, but not a motivating factor behind, a termination of employment." *Titsch v. Reliance Group Inc.*, 548 F. Supp. 983, 985 (S.D. N.Y. 1982). Hence, a critical issue regarding Plaintiff's ERISA claim is whether Plaintiff has demonstrated that Defendant terminated him with the specific intention of depriving him of his ERISA benefits.

On page 7, paragraph 27 of his proposed findings of fact and conclusions of law, Plaintiff makes the blanket statement that his "eligibility and entitlement to benefits under an employee welfare benefit plan was . . . a determining factor in defendant's decision to discharge plaintiff." For support, on the top of page 12 of his proposal, the Plaintiff states that Defendant

> unlawfully discharged Nelson in violation of ERISA since it discharged Nelson in order to save medical costs on the health and welfare benefit plan, and also to save costs on Nelson's pension plan, in light of the fact that he was a thirty-year employee, and the new management incentive plan stood to greatly increase the pension benefits a senior manager like Nelson would accrue.

The Court finds no substantial support in the record for this assertion. The Court acknowledges that the Defendant introduced its new management incentive plan on January 18, 1991 — less than a month before terminating the Plaintiff on February 15, 1991. However, the proximity between the introduction of the plan and the Plaintiff's termination is not enough to carry the ERISA claim.

The problem in this case is that Plaintiff failed to produce any substantial evidence which showed that Defendant intended to deprive him of his ERISA benefits. In fact, Plaintiff is still vested in his ERISA-covered plans and he continues to receive the same benefits as those received by active employees. Nothing has changed. The plan paid for Plaintiff's insurance benefits before his discharge and it continues to pay those benefits today. The contention that the Plaintiff lost stock options is not accurate. Such options are a component of Plaintiff's compensation, but are not part of an ERISA plan. *See,* 29 C.F.R. Sections 2510.3-2(c) and 2510.3-1(b). Similarly, Plaintiff's references to other potential increases in compensation via salary and/or bonus (which Defendant refers to as "incentive") compensation, likewise is not an ERISA plan, but a payroll practice. *Id.* It is true that if the discharge was

upheld, the Plaintiff would lose pension benefits resulting from the lost opportunity to accrue a few additional years of service. The Plaintiff's evidence in this regard was not persuasive enough to carry the day.

Based on the foregoing, the Court is persuaded that Plaintiff has failed to meet the third *Clark* prong. The Court is therefore persuaded that Plaintiff has failed to establish a *prima facie* case of ERISA discrimination. The Plaintiff's ERISA claim, therefore, is denied.

Moreover, before filing suit under the ERISA statute, employees are to first exhaust any internal administrative remedies under the plan. *Anderson v. Alpha Portland Industries,* 727 F.2d 177, 180 (8th Cir. 1984). Plaintiff did not exhaust — nor does he assert that he even tried to exhaust — the administrative remedies under ERISA. Therefore, Plaintiff's ERISA claim is barred.

2. *Plaintiff's Iowa Civil Rights Act (ICRA) Disability Discrimination Claim (Fourth Cause of Action)*

It is not contested and this Court is persuaded that the Defendant is an "employer" within the meaning of Iowa Code Section 216(7), and that Plaintiff was an employee of Defendant's at all times relevant to this action.

Under Iowa Code Section 216.6(1)(a), it is an unfair employment practice for an employer to discharge any employee on the basis of a disability. Under Iowa Code Section 216.2(5), a "disability" is defined, in relevant part, as "the physical or mental condition of a person which constitutes a substantial handicap." The terms "physical and mental condition" and

"substantial handicap" are not defined in the Act. However, under *Sommers v. Iowa Civil Rights Comm'n*, 337 N.W.2d 470, 476-77 (Iowa 1983), a physical or mental impairment is a substantial handicap if it has "an inherent propensity to limit (one or more of the individual's) major life activities."

Therefore, the Court is confronted with two issues: whether the Plaintiff was "disabled" and, if so, whether the Defendant discriminated against the Plaintiff because of that disability. In making a legal determination on the issue of disability, the Court is mindful of the fact that Plaintiff underwent five surgeries during his final years as a manager for the Defendant's Sioux City and Bismarck, N.D. stores. Based on Plaintiff's testimony at trial, although he was given paid recuperation time and was not pressured to return to work at any time, he was nonetheless in great pain when working, and was not as objective or patient with others as he apparently was prior to those surgeries.

In addition, the Social Security Administration determined that Plaintiff is totally disabled and has been so-disabled since the day he was terminated by the Defendant. In light of the fact that Plaintiff was working under the residual effects of several surgeries and surgery-related complications which befell him in a relatively short span of time, as well as the Social Security Administration's total disability determination, this Court is persuaded that Plaintiff has made out a *prima facie* case of disability for the period relevant to this dispute.

The second part of the analysis is whether the Plaintiff was discriminated against by the Defendant on the basis of that disability. Under Iowa law, in order for an employee to establish a claim of disability discrimination, he must establish the following prima facie elements:

a. that he was disabled;

b. that he was qualified for the job from which he was discharged;

c. that despite his qualifications, he was terminated; and

d. that after his termination, the employer hired a person not in the employee's protected class, or retained persons with comparable or lesser qualifications.

Tobaugh v. Hy-Vee Stores. Inc., 392 N.W.2d 154, 156 (Iowa 1986). *See also, McDonnell Douglas*, 411 U.S., at 802 (1972).

As mentioned above, the Court is persuaded that Plaintiff has shown that he was both disabled and qualified. Therefore, Plaintiff has established the first two Tobaugh/McDonnell Douglas factors[1].

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1. The Jury in this case did not actually make a finding of age discrimination on the basis of each individual *Tobaugh/McDonnell Douglas* factor. Instead, the Jury followed Final Jury Instruction No. 9, which was a modified version of Eighth Circuit Model Civil Jury Instruction 5.91 which stated that

> Your verdict must be for plaintiff on plaintiff's age discrimination or retaliation claim if he has proved by the preponderance of the evidence that plaintiff's age or filing of a charge of discrimination was a determining factor in defendant's decision.

The Committee Comments to Instruction 5.91 state that "It is unnecessary and inadvisable to instruct the jury regarding the three-step analysis of *McDonnell-Douglas* "citations omitted]. Instead, the submission to the jury should focus on

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In regard to the third *Tobaugh* factor, this Court is persuaded that despite his qualifications as a J.C. Penney manager, Plaintiff was discharged. As stated earlier in this Order, the Court is particularly persuaded by the fact that throughout his career and up to and contemporaneous with the complaint letters received by his subordinates, Plaintiff consistently received nearly perfect ratings from the Defendant regarding his performance as a manager.

The testimony of the Plaintiff and the Defendant's district-level management indicated that these ratings primarily emphasized areas such as store productivity and reduction of "shrinkage" (theft), and de-emphasized a manager's "people skills." Nonetheless, the Defendant's representatives testified that promotions to larger stores and increases in pay were based in large part on those ratings reports.

The Plaintiff's ratings did not decrease until he was moved to Bismarck, and this rating reduction had more to do with his status as a "new" store manager than his ability to manage a J.C. Penney store[2]. Hence, the Court is persuaded that by issuing high ratings along with corresponding incentive pay raises to the Plaintiff, the Defendant conceded that Plaintiff was not only

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the ultimate issue of whether intentional discrimination was a determining factor in the defendant's employment decision." This Court therefore assumes that the Jury ruled favorably on these two factors.

2. Testimony at trial indicated that when a manager is "reassigned," irrespective of whether it is the result of a promotion to a larger store or a demotion to a smaller store, a consequence is that the manager's rating is lowered because it is not possible to rate the manager's performance at that store until he has had the opportunity to manage it.

qualified to do the job, but was an outstanding store manager in spite of some perceived deficiencies in his ability to get along with his subordinates. The Court is accordingly persuaded that Plaintiff was terminated despite his qualifications as a store manager.

Regarding the fourth *Tobaugh* factor, whether Plaintiff was replaced by members of his protected class or whether Plaintiff was replaced by individuals of lesser experience or competence, this factor was not addressed by either party during the trial. Hence, the Court cannot decide, as a matter of law, whether Plaintiff's replacements were either disabled or less competent or experienced. Although some evidence suggested that the Bismarck, N.D. replacement was in his early 40s when Plaintiff was terminated, no evidence was presented concerning that individual's physical condition, experience or competence. Similarly, no evidence was offered in regard to the Sioux City replacement's physical condition, age, experience or competence. The Court cannot rule as a matter of law that the Defendant replaced the Plaintiff with individuals who were either not disabled or who were less qualified than the Plaintiff.

Therefore, the Court is persuaded that the Plaintiff did not make out a *prima facie* case of disability discrimination under the ICRA since he cannot establish all four of the elements required by *Tobaugh*. As a result, as to this disability discrimination claim, the Court finds for the Defendant.

3. Plaintiff's Damages

Mindful of the Jury verdict, which it upholds, the Court is persuaded that the Plaintiff is entitled to damages, costs and attorney's fees on his claim of age discrimination.

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Since the Jury found that unlawful age discrimination occurred in this case, the Court's job is to fashion a remedy that will make the Plaintiff "whole" for injuries he has suffered due to this unlawful discrimination. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975); *Geller v. Markham*, 635 F.2d 1027, 1036 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981): *Dickerson v. Deluxe Check Printers. Inc.*, 703 F.2d 276, 279-80 (8th Cir. 1983).

a. Liquidated damages

"Section 7(b) of the ADEA, 29 U.S.C. Sec. 626(b), provides for liquidated damages where a finding of willful violation is made." *Castle v. Sangamo Weston. Inc.*, 837 F.2d 1550, 1561 (11th cir. 1988). Because the jury found that Defendant willfully violated the Age Discrimination in Employment Act, the Court will determine the amount of liquidated damages to be awarded to Plaintiff. "Liquidated damages are defined in the Fair Labor Standards Act, 29 U.S.C. Section 216(b), incorporated by reference in the ADEA, 29 U.S.C. Section 626(b), as an amount equal to "minimum unpaid wages or . . . unpaid overtime compensation." *Bruno v. W.B. Saunders Co.*, 882 F.2d 760, 772 (3d Cir. 1989).

Liquidated damages are not permissible to double front-pay, though they are permissible to double back pay. *Bruno*, 882 F.2d, at 771-72. The standard for awarding liquidated damages in an amount which would double a Plaintiff's back pay award is whether "the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Trans World Airlines. Inc. v. Thurston*, 469 U.S. 111, 128 (1984). The jury in this case was so instructed in Jury Instruction #9A, which states the following:

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> If you find that the defendant discriminated against the plaintiff on the basis of age or retaliated against him for filing a civil rights complaint, then you should further decide whether defendant's violation of the age discrimination statute was willful. If you find that defendant's violation of the ADEA was willful, the court will award plaintiff additional money damages.
>
> A violation is willful if the defendant either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the federal law under which the plaintiff sues. A violation is willful if it is done deliberately and intentionally and not by accident, inadvertence or ordinary negligence.
>
> Since willful discrimination is seldom admitted, you may consider any statements made, any acts done or omitted and all of the facts or circumstances disclosed by the evidence to show whether defendant willfully violated the Age Discrimination in Employment Act.

As can be seen in paragraph one, the Court told the Jury that if the violation was willful, the Court "*will*" award the Plaintiff additional money. The Jury Question relating to this was as follows:

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3. Was the violation or violations willful as explained in Instruction No. 9A?

Yes X_ No __

The Jurors put an "X" on the "Yes" side. This Court is persuaded that it can under some circumstances deny the request to double the back pay award[3], but doesn't find any mitigating reason to do so. The will of the Jury will not be disturbed. The award of back pay will be doubled.

b. Front pay

Plaintiff's Exhibit 27 is a calculation of benefits prepared by Plaintiff's expert Randall Kramer which includes liquidated damages. Mr. Kramer's benefits calculation is based on the assumption that, had he not been terminated, Plaintiff would have worked to age 65. The evidence showed that most J.C. Penney managers stopped working at age 60. This was because their benefits were tailored to maximize at that age. Defendant could not under the law force its managers out at age 60. The

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3. The district court's discretion in deciding whether to award liquidated damages is limited to situations in which the employer "can show good faith and reasonable grounds for believing it was not in violation of the . . . ADEA." *Trans World Airlines*, 469 U.S., at 128, n. 22. *See also, Berndt v. Kaiser-Aluminum & Chemical Sales. Inc.*, 604 F. Supp. 962, 967 (E.D. Pa. 1985) (Liquidated damages doubling back pay inappropriate where evidence insufficient to demonstrate defendant's knowledge that it was violating the federal law, or that it intented to do so, or that it operated under reckless disregard for the federal law); *Heiar v. Crawford Cty, Wis.*, 746 F.2d 1190, 1201 (7th Cir. 1984) (Liquidated damages which would double back pay inappropriate where the defendant county could not be expected to know that it was violating the ADEA given confusion in the circuits as to whether the ADEA was unconstitutional).

Plaintiff said that he intended to continue working beyond age 60. This Court cannot conclude that he would have quit at age 60. However, based upon the health of the Plaintiff and the fact that Defendant's retirement plan is geared to award the greatest benefits at age 60, and for those benefits to decrease thereafter, the Court is persuaded that the Plaintiff would have retired at age 63.

Plaintiff's Exhibit 1 is the J.C. Penney Benefits Statement for 1990. It indicates that retirement at age 60 would result in Plaintiff's target income from all sources being 52.1% of average earnings, in addition to the value of personal accounts and savings plans. It is reasonable to conclude that, working until age 63, Plaintiff would expect to retire at 53.5% of his average earnings.

Since Plaintiff obtained a jury verdict on his age discrimination and retaliation claims, he is entitled to front pay to the age of 63, computed in accordance with calculations set forth in Plaintiff's Exhibit 27. *Doyne v. Union Electric,* 953 F.2d 447, 450 (8th Cir. 1990); *Acrey v. American Sheep Ind. Ass'n.,* 981 F.2d 1569, 1576 (10th Cir. 1992). Front pay is especially appropriate where the Plaintiff has no reasonable prospect of obtaining comparable employment. *Buckley v. Reynolds Metals, Co.,* 690 F. Supp. 211, 21415 (S.D. N.Y. 1988); *Proctor v. Consolidated Freightways Corp.,* 1991 U.S. App. LEXIS 3090 (9th Cir. 1991). As discussed more fully in subsection "d" of this Order, the Court is persuaded that at the time he was terminated, Plaintiff had no reasonable prospect of obtaining comparable employment. Therefore, front pay is appropriate in this case.

The Plaintiff's birthday was January 14, 1936. He was age 55 when he was terminated in February, 1991. Hence, he will turn

63 in 1999. Lines 5 through 9 on Exhibit 27 represent Plaintiff's salary plus stock options, multiplied by the 10 year treasury note rate of six percent annually from August, 1994 through August, 1999. One quarter of line four reflects one-quarter of the salary plus stock options which will commence on August 1, 1994, four and a half months from the date of this Order. This is front-pay. The other three quarters of line 4 is back pay from August 1, 1993 to the date of this Order. Thus, the calculation from Exhibit 27 is as follows:

Exhibit 27 Present Value Totals:

Line 5:	8/1/95	$109,574
Line 6:	8/1/96	$109,623
Line 7:	8/1/97	$109,561
Line 8:	8/1/98	$109,536
Line 9:	8/1/99	$109,580
Total of Lines 5 through 9:		$547,874.00
		+
One quarter of Line 4 of Exhibit 27: ($109,527 . 4 = 27,381.75)		$27,381.75
Gross Front Pay Award:		$575,255.75

Thus, Plaintiff's gross front-pay award is $575,255.75. Based upon the cross-examination testimony of Mr. Kramer regarding the levelling off of annual salary increases for J.C. Penney managers as they reached a certain salary threshold, the Court is persuaded that this gross pay figure should be reduced by 1%, or $5,752.55. Therefore, the Court finds that Plaintiff is entitled to a net front-pay award of $569,503.20.

c. Back pay

Similarly, the first four lines of Plaintiff's Exhibit 27 represent the annual pay Plaintiff would have received — plus eight months' pay — had he not been terminated by Defendant. This is commonly referred to as "back pay." Dating back from the date of this Order, the total back pay to be awarded Plaintiff, minus the extra four months' pay from April, 1994 to August, 1994, is as follows:

Exhibit 21 Present Values:

Line 1:	8/1/91	$ 50,241
Line 2:	8/1/92	$109,573
Line 3:	8/1/93	$109,573
Total of Lines 1 through 3:		$269,387
		+
Three Quarters of Line 4 from Exhibit 27: ($109,527 + 75 = $82,145.25)		$82,145.25

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Back Pay Award:	$351,532.25
	X 2.00
Total Back Pay Award:	$703,064.50

d. Mitigation of damages

In order to minimize damages owed to unlawfully-terminated employees, the employer has the burden of proof to show that the plaintiff employee failed to exercise reasonable diligence in seeking other employment in an attempt at mitigating his damages. *Spulak v. K-Mart Corp.*, 894 F.2d 1150, 1158 (10th Cir. 1990). As stated above, the Court is persuaded that Plaintiff did what he could to mitigate his damages. It is true that the Plaintiff did not go out and get a job selling cars. However, this Court is persuaded that a 30-year manager for a national department store chain should not have to go out and sell cars or pursue any other significantly lower-paying career for which he is not qualified in order to mitigate damages. The Court is persuaded that at age 55 Plaintiff had no chance of becoming a manager for a J.C. Penney competitor such as Sears or Montgomery Ward for the same or similar wages. Therefore, the Court is persuaded that Defendant did not meet its burden of showing that Plaintiff failed to mitigate his damages. *Buckley*, 691 F. Supp., at 214.

The evidence at trial indicated that Plaintiff enjoys the benefit of the Defendant's associate discount privilege, which should continue. Term life insurance benefits have been restored to Plaintiff since he has been placed on disability status, and should continue at active employee rates until Plaintiff reaches age 63, and thereafter at retired employee rates. Similarly, Plaintiff's medical and dental plans should continue at active employee rates until he reaches age 63, and thereafter as a retired

employee. To the extent that any of the fringe benefits mentioned thus far are normally made available to an employee's surviving spouse, they should continue to be made available to Plaintiff's spouse in the event of his demise.

Plaintiff has been receiving retirement benefits of $1,021 per month since he was discharged. According to Defendant, the continued receipt of these benefits, along with liquidated damages, would be a windfall. Thus, Defendant seeks to have this Court offset its damages by the amount of retirement benefits Plaintiff has been and will continue to receive. The Court is aware that courts in different circuits have reached different results. For example, in *Meschino v. I.T.T. Corn.*, 661 F. Supp. 254 (S.D. N.Y. 1987), the district court ruled that pension benefits should be deducted from damages awards because "(b)y receiving benefits which he would not have received had he not been terminated, to the [Plaintiff] was receiving compensation for his termination. There is no reason to require [Defendant] to pay twice for discriminating against [Plaintiff] . . . " *Meschino*, 661 F. Supp., at 259.

However, this Circuit does not recognize the collection of pension benefits as compensation from the employer. Instead, this Circuit recognizes pension benefits as received from a collateral source, so that a Plaintiff's receipt of both pension benefits and damages for unlawful termination is not recognized as a "windfall" which would effectively double Plaintiff's damages. *Doyne v. Union Elec. Co.*, 953 F.2d 447, 451-52 (8th Cir. 1992). "Pension benefits may be viewed as *earned* by the claimants, and therefore not paid by the employer at all." *E.E.O.C. v. O' Grady*, 857 F.2d 383, 391 (7th Cir. 1988) (emphasis in original). In unlawful termination cases, the Defendant cannot, under Eighth Circuit precedent, offset the

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Plaintiff's damages with the amount of pension benefits Plaintiff has received. This is so on the ground that in these cases, the Plaintiffs are effectively forced to exhaust their plan benefits since, but-for the unlawful termination, they would have received regular wages. *Blake v. J.C. Penney*, 894 F.2d 274, 282 (8th Cir. 1990), *citing Dickerson, supra*, 703 F.2d, 279-80. This Court is persuaded that the amount of pension benefits which Plaintiff has received shall not be used to offset Defendant's damages obligation.

Shortly before trial, Plaintiff began receiving other benefits from the Defendant. These benefits included a lump-sum amount of long-term disability benefits averaging $3,002 per month, which was retroactive to September 1, 1991. These benefits were awarded under the terms of Defendant's long-term disability and supplemental long-term disability plans, both of which were in effect at the time of Plaintiff's termination and both of which were a part of the J.C. Penney benefit package which Plaintiff participated in (Plaintiff's Exhibit 1).

Unlike the pension benefits, these benefits would be awarded to Plaintiff whether he was unlawfully terminated or not. However, they would not be awarded on top of the Plaintiff's ordinary salary, which the back pay award is designed to compensate for. The testimony of Mr. Brewer was that the long-term disability was paid approximately three-fourths by the employer and one-fourth by the employee. Accordingly, Defendant should receive a credit of $2,250 per month (three-fourths of $3,000) for any long-term disability and supplemental long-term disability benefits which it provided to the Plaintiff as part of its benefits package. *BeShears v. Asbill*, 930 F.2d 1348, 1355, n. 11 (8th Cir. 1991).

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Since receiving the favorable ruling from the Secretary of Health and Human Services on his total disability claim, Plaintiff has also been receiving Social Security disability benefits which were made retroactive to the day he was discharged. Defendant seeks to offset its damages obligation to Plaintiff with the amount of those benefits. Plaintiff cites *Maxfield v. Sinclair Int'l*, 766 F.2d 788 (3d Cir. 1985) for the proposition that if this Court were to off-set Plaintiff's damages with his Social Security disability benefits, the Court would effectively encourage employers to dismiss disabled employees.

Maxfield states that the overall justification for not providing a set-off against Social Security benefits is "compensating victims in a make whole fashion." *Maxfield*, 766 F.2d, at 794. The Court finds *Maxfield's* underlying rationale is less persuasive than the ruling articulated by the Massachusetts District Court in *Crosby v. New England Tel. & Tel., Co.*, 624 F. Supp. 487 (D. Mass. 1985). Citing *Maxfield*, the *Crosby* Court concluded that when considering whether to offset Social Security benefits from a damages award, a district court should take into consideration whether the liquidated damages would make Plaintiff whole again if the disability benefits were not included. This Court notes that Plaintiff only sought Social Security disability benefits after he was terminated. Since back and front pay damages will effectively provide Plaintiff with the same income he would have received had he remained employed with Defendant until age 63, the Court is persuaded that those damage awards make him "whole." The Court is persuaded that the addition of the Social Security awards Plaintiff has already received and continues to receive would make him more than whole, in violation not only of the rational rule of *Crosby*, but also of the underlying rationale of *Maxfield*. Therefore, all such payments heretofore received from Social Security Disability shall be used to reduce the Defendant's damage obligation.

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e. Prejudgment Interest

"The ADEA does not indicate whether or not prejudgment interest may be awarded under the statute. The ADEA, however, is incorporated into the Fair Labor Standards Act (FLSA), 29 U.S.C. Sections 201, *et. seq.* It is settled that the FLSA does not permit successful plaintiffs to obtain prejudgment interest in addition to liquidated damages because that would enable them to obtain double recovery." *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1102 (8th Cir. 1982), *citing Brooklyn Savings Bank v. O'Neil*, 234 U.S. 697, 715-16 (1945) and *Masters v. Maryland Mgt. Co.*, 493 F.2d 1329, 1334 (4th Cir. 1974). *See also, McCann v. Texas City Refining, Inc.*, 984 F.2d 667, 673 (5th Cir. 1993). Therefore, the Court shall not award pre-judgment interest on Plaintiff's liquidated damages.

Plaintiff has not sought reinstatement with the Defendant and the Court is persuaded that reinstatement would not be appropriate. Therefore, the Court is not considering it in making its ruling.

IT IS THEREFORE ORDERED that the Plaintiff, Dale E. Nelson, based on the jury verdict in his favor on the age discrimination claim, shall have a front-pay award against the Defendant, J.C. Penney Company, in the amount of $569,503.20 and a back pay award of $703,064.50 (with no pre-judgment interest) less a set-off for Social Security disability payments Plaintiff has already received, and less $2,250 per month for Plaintiff's long-term disability benefits already received, plus interest as provided by law, reasonable attorney fees, and the costs of this action.

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IT IS FURTHER ORDERED that post-judgment interest shall be added to both the front and back pay awards as provided by law.

IT IS FURTHER ORDERED that the Plaintiff shall cease receiving pension benefits between the period from the date of this Order until he reaches age 63 and will resume from that time until the time of the Plaintiff's death.

IT IS FURTHER ORDERED that within 20 days of the date of this Order, the Plaintiff shall file an accounting setting out all Social Security Disability payments that he has received since the date of the award of benefits from the Secretary of Health and Human Services and the Defendants shall file an accounting setting out all disability payments they have paid to the Plaintiff up to the date of this Order.

IT IS FURTHER ORDERED that the Court will set a hearing on Plaintiff's claim for attorney fees and costs at the Court's earliest convenience.

IT IS FURTHER ORDERED that the Plaintiff shall within 20 days of the date of this Order update the benefits he has received each year as shown by Exhibits U-3 and R-3A as they pertain to his projected Savings plan. The Defendant shall cooperate with the Plaintiff in calculating this figure.

IT IS FURTHER ORDERED that the Plaintiff will receive $8 for each month since his termination for an insurance differential.

Judgment shall be entered after the computation of interest, costs and attorney fees.

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April 26, 1994

s/ Donald E. O'Brien
Donald E. O'Brien, Senior Judge
UNITED STATES DISTRICT COURT

Copy mailed by regular mail April 26, 1994 to:
Emmanuel Bikakis; 507 7th Street; Suite 304; Sioux City, IA 51101
James Zalewski; PO Box 81607; Lincoln, NE 68501-1607
P Keven Connelly; Michael Sheehan; 350 N LaSalle Street; Suite 750; Chicago, IL 606
Douglas Phillips; PO Box 327; Sioux City, IA 51102

s/ illegible
Deputy Clerk

APPENDIX D — RELEVANT STATUTES

Age Discrimination in Employment Act

29 U.S.C. § 623

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer —

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or to refer for employment any individual on the basis of such individual's age.

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(c) Labor organization practices

It shall be unlawful for a labor organization —

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitations, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practice; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization —

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section —

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan —

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement

proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Repealed. Pub.L. 101-239, Title VI, § 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233.

(h) Practices of foreign corporations controlled by American employers; foreign persons not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the —

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control, of the employer and the corporation.

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(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits —

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan —

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of Title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of Title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

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(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of Title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of Title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals.

(7) any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of Title 26 and subparagraphs (C) and (D) of section 411(b)(2) of Title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2) of Title 26.

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of Title 26.

(9) For purposes of this subsection —

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(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of Title 26.

(j) Repealed. Pub.L. 99-592, § 3(b), Oct. 31, 1986, 100 Stat. 3342

(k) Date of adoption of system or plan

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

(*l*) Minimum age requirements; early retirement benefits

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section —

(1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because —

(A) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(B) a defined benefit plan (as defined in section 1002(35) of this title) provides for —

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age —

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii);

are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph

(A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c)(17) of Title 26) that —

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age) —

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that

provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E)(i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, an $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on October 16, 1990, and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions) —

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

29 U.S.C. § 626

§ 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practice alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

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(c) Civil actions: persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter; *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed —

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Reliance on administrative rulings; notice of dismissal or termination; civil action upon receipt of notice

Section 259 of this title shall apply to actions under this chapter.

If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), waiver may not be considered knowing and voluntary unless at a minimum —

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

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(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to

be understood by the average individual eligible to participate, as to —

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program; and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum —

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

29 U.S.C. § 631

§ 631. Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

(b) Employees or applicants for employment in Federal Government

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan,

or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

(d) Repealed. Pub.L. 99-592, § 6(b), Oct. 31, 1986, 100 Stat. 3344

Supreme Court, U.S.
FILED
JUN 19 1996
OFFICE OF THE CLERK

No. 95-1878

In The

Supreme Court of the United States

October Term, 1995

DALE NELSON,

Petitioner,

vs.

J.C. PENNEY COMPANY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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8 pp

STATEMENT PURSUANT TO RULE 29.6

Respondent J.C. Penney Company, Inc. has no parent companies or nonwholly owned subsidiaries to list pursuant to Rule 29.6.

REASONS FOR DENYING THE WRIT

Petitioner Dale Nelson alleged in his lawsuit that Respondent J.C. Penney Company, Inc. terminated him because of his age. The company articulated legitimate reasons for the termination — Nelson's abrasive and intimidating management style had produced uprisings in the stores he managed. (Pet. App. B, 6a-7a, 10a). Upon review of the record, the Court of Appeals determined that "[t]here was no conflicting testimony or other substantial evidence . . . from which a reasonable factfinder could conclude that the employer's proffered reasons for Mr. Nelson's termination were pretextual" and ordered judgment as a matter of law in J.C. Penney's favor. *Nelson v. J.C. Penney* (Pet. App. B, 10a-11a).

The Petition for a Writ of Certiorari should be denied. It is untimely and presents neither important issues for this Court nor a conflict among Courts of Appeals.

I. THE PETITION FOR CERTIORARI IS UNTIMELY.

This Court lacks jurisdiction because the Petition was not filed within 90 days of the judgment below as required by 28 U.S.C. § 2101(c). "This 90-day limit is mandatory and jurisdictional." *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990).

The Court of Appeals issued its initial decision in this case on November 21, 1995. *See Nelson v. J.C. Penney*, 70 F.3d 962 (1995). On December 1, 1995, Nelson filed a "Suggestion for Rehearing *En Banc*," which the Court of Appeals treated as also including a *petition* for rehearing by the panel, thereby tolling the period for seeking certiorari until the panel ruled on the petition for rehearing. The panel denied rehearing on January 24, 1996, thus beginning Nelson's 90-day period in which to petition for

certiorari.[1] After that date, all Nelson had pending in the Eighth Circuit was a *suggestion* for rehearing *en banc* (no longer treatable as a *petition* for rehearing since the panel had already denied that) which does not toll the period for seeking certiorari. Supreme Court Rule 13.3; Fed. R. App. P. 35; *Missouri v. Jenkins*, 495 U.S. at 45 - 47. Therefore, Nelson's Petition — filed on May 17, 1996 (114 days after the denial of rehearing by the panel) — is untimely and this Court has no jurisdiction over it. 28 U.S.C. § 2101(c); *Missouri v. Jenkins*, 495 U.S. at 45.

II. THIS PETITION INVOLVES NOTHING MORE THAN PETITIONER'S DISAGREEMENT WITH THE APPELLATE COURT'S REVIEW OF THE RECORD.

Nelson contends that the Eighth Circuit failed to follow this Court's decision in *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993). (Pet. at 4-18). To give that impression, he takes quotations from the decision here out of context (wrongly implying that the Court of Appeals held that no age discrimination plaintiff can prevail without "direct" evidence of discrimination) and juxtaposes them with quotations from *Hicks*, also taken out of context (wrongly implying that there can be no appellate review of a jury's finding of discrimination whenever a prima facie case is established).[2] (Pet. at 7).

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1. Nelson's Petition sidesteps this jurisdictional defect by omitting any mention of the Court of Appeals' November 21, 1995 decision; by omitting any mention that the January 24, 1996 decision was, in fact, a denial of what the court deemed a pettion for rehearing by the panel; and by omitting from Appendix B to the Petition the first page of the January decision, which reads, in part: "Appellee/ Cross-Appellant's petition for rehearing by the panel has been considered by the court and is denied." (App. hereto). Instead, the Petition implies that the panel's January denial of rehearing was its first adjudication of the case, and gingerly states that "[t]he latest opinion of the . . . Court of Appeals . . . was a decision to deny a *Petition* for Rehearing en banc." (Pet. at 1 [emphasis added])

2. Nelson's concern that the Eighth Circuit's decision does not cite (Cont'd)

Here, the Eighth Circuit examined all of Nelson's evidence of pretext and found it insufficient. (Pet. App. B, 8a-10a). After concluding that there was no submissible case based on proof of pretext, the court also considered whether there was a submissible case based on direct evidence of age as a motivating factor; only there did it state "we see no evidence 'directly reflecting the alleged discriminatory attitude' " — a view which is undisputed in this case. (Pet. App. B, 8a - 10a) Such appellate review is both necessary and proper. *See Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993) (reversing jury's finding of age discrimination where the evidence was legally insufficient). The Eighth Circuit's analysis was, accordingly, completely consonant with its obligations under both *Hazen Paper* and *Hicks*. 113 S. Ct. at 2756 (factfinder determines pretext "subject, of course, to appellate review. . . .").

III. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS.

The difference between this case and those Nelson cites is not in the law applied, but in the record.[3] Although Nelson cites

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(Cont'd)

Hicks by name (Pet. at 3) is inconsequential. The court recites the burden-shifting analysis used in *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 801 (8th Cir. 1994), which is taken directly from *Hicks* and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-255 (1981). (Pet. App. B, 7a-8a). Contrary to Nelson's assertion, moreover, the Eighth Circuit's reference to *Boatmen's* is proper even though *Boatmen's* involved a reduction in force: the burden-shifting/proof of discrimination analysis in *Boatmen's* is the same as in *Hicks* and *Burdine*. 26 F.3d at 801.

3. Nelson, however, continues to misrepresent that record. For example, his assertion that the Court of Appeals ignored evidence — *e.g.*, that "Penney's expert witness testified that managers are expected to retire at age 60" (Pet. at 8 - 9, *citing* J.A. at 834-836) — is disingenuous. The testimony was not from an expert and was not what Nelson claims, but only innocuous background evidence that age 60 is the point when some managerial employees are permitted to take full retirement benefits. (J.A. at 836).

Rhodes v. Guiberson Oil Tools, 75 F.3d 989 (5th Cir. 1996), that decision acknowledged that appellate review is fact-intensive: "[t]he evidence necessary to support an inference of discrimination will vary from case to case. . . . [and] if the evidence put forth by the plaintiff to establish the *prima facie* case and to rebut the employer's reasons is not substantial, a jury cannot reasonably infer discriminatory intent." 75 F.3d at 994. The Fifth Circuit there upheld the jury verdict because the employer changed its proffered reason (first citing a reduction in force, later claiming performance problems) and its own officials testified that the reduction in force reason was untrue and also contradicted the claim of poor performance. *Id.* at 994-996. These facts starkly contrast to the lack of "conflicting testimony or other substantial evidence . . . from which a reasonable factfinder could conclude that the employer's proffered reasons for Mr. Nelson's termination were pretextual." *Nelson v. J.C. Penney* (Pet. App. B, 10a). The different results on appeal merely reflect conflicting facts — not conflicting legal standards.[4]

Nelson also suggests that the Eighth Circuit deviated from its own precedent. That is both insignificant and wrong. A conflict between decisions of different panels of the same court of appeals is not a sufficient basis for granting a writ of certiorari. *See Davis v. United States*, 417 U.S. 333, 340 (1974). More importantly, there is no conflict here. The instant case differs from *Gaworski v. Commercial Finance Corp.*, 17 F.3d 1104,

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4. That is equally true of the supposed conflict Nelson suggests exists with *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995), *cert. granted in part*, 116 S. Ct. 805, *cert. dismissed*, 116 S. Ct. 1037 (1996) (plaintiff "introduced sufficient evidence for the jury to conclude . . . that he had proven . . . [the employer's] proffered reasons were pretextual"). Certiorari, moreover, was granted in *Barbour* solely on the issue of what must be proven to establish punitive damages under 42 U.S.C. § 1981, and has since been dismissed due to settlement. *See* 116 S. Ct. 805 and 116 S. Ct. 1037.

1110 (8th Cir. 1994) — which Nelson also cites — not in the standard applied but in the record: in *Gaworski*, the court found "sufficient evidence for a reasonable jury to reject the defendant's proffered reasons for its actions." *See Ryther v. KARE 11*, 84 F.3d 1074, n.3 (8th Cir. 1996) (upholding a jury verdict, but explicitly recognizing that *Nelson v. J.C. Penney* is consistent with the standards applied).

Application of the same standards to different facts does not create a conflict between Courts of Appeals or even within the Eighth Circuit. The instant Petition merely asks the Court to review a factual record. It presents no significant legal issues and is not worthy of this Court's attention.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED JANUARY 24, 1996

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 95-1253/1305

Dale Nelson,

Appellee/Cross-Appellant,

vs.

J.C. Penney Company, Inc.,

Appellant/Cross-Appellee.

Appeal from the United States District Court
for the Northern District of Iowa

Appellee/Cross-Appellant's petition for rehearing by the panel has been considered by the court and is denied.

Attached to this order is a revised opinion. This opinion supersedes the opinion filed on November 21, 1995.

January 24, 1996

Order Entered at the Direction of the Court:

s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit